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CIVIL AND POLITICAL RIGHTS, INCLUDING THE QUESTIONS OF INDEPENDENCE OF THE JUDICIARY, ADMINISTRATION OF JUSTICE, IMPUNITY

Report of the Special Rapporteur on the independence of judges and lawyers Dato' Param Cumaraswamy, submitted in accordance with Commission resolution 2000/42

GE.01-10830 (E)

Executive summary

This is the seventh annual report of the Special Rapporteur whose mandate, created by Commission resolution 1994/41, calls upon him:

(a) To inquire into any substantial allegations transmitted to him and report his conclusions thereon;

(b) To identify and record not only attacks on the independence of the judiciary, lawyers and court officials but also progress achieved in protecting and enhancing their independence, and make recommendations including the provision of advisory services or technical assistance when they are requested by the State concerned;

(c) To study, for the purpose of making proposals, important and topical questions of principle with a view to protecting and enhancing the independence of the judiciary and lawyers.

The report contains eight chapters dealing with his terms of reference, methods of work, the activities undertaken during the year, some theoretical issues, professional standards, some judicial decisions reflecting the independence and impartiality of the judiciary, situations in 41 countries or territories, and his conclusions and recommendations. During the year the Special Rapporteur sent out several interventions including five urgent appeals and seven urgent appeals in association with other special rapporteurs.

In the course of the year, the Special Rapporteur undertook visits to South Africa, Belarus and the Slovak Republic and separate reports on these missions will be before the Commission.

The Special Rapporteur has included in the present document a summary of his observations with respect to his attendance of the trial of H.M. Soeharto from 30 August to 2 September and from 13 to 15 September 2000. He has also summarized the developments concerning the defamation suits pending against him in Malaysia. With regard to the United Kingdom of Great Britain and Northern Ireland, the Special Rapporteur has expressed his continued concerns over the investigations into the murders of Patrick Finucane and Rosemary Nelson. With regard to South Africa, the Special Rapporteur has expressed his concern regarding a recent proposal by the Government to alter the regulation of the legal profession.

The Special Rapporteur has also drawn the attention of the Commission to the invitations extended to him by the Governments of Mexico, Saudi Arabia and Zimbabwe. The Special Rapporteur intends to undertake missions to those countries during the course of this year. The details, including the dates, are currently being discussed.

Among the recommendations, the Special Rapporteur has once again called upon the Government of the United Kingdom of Great Britain and Northern Ireland to establish an independent judicial inquiry into the murder of Patrick Finucane.

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Introduction

1. The present report is submitted pursuant to Commission on Human Rights resolution 2000/42. It is the seventh annual report to the Commission by the Special Rapporteur since the mandate was established by the Commission in its resolution 1994/41, renewed in resolution 2000/42 and endorsed by the Economic and Social Council in its decision 2000/264 (see also E/CN.4/1995/39, E/CN.4/1996/37, E/CN.4/1997/32, E/CN.4/1998/39, E/CN.4/1999/60 and E/CN.4/2000/61).

2. Chapter I of the present report contains the terms of reference for the discharge of the mandate. Chapter II refers to the methods of work applied by the Special Rapporteur in the discharge of his mandate. In chapter III, the Special Rapporteur presents an account of the activities undertaken within the framework of his mandate in the past year. Chapter IV provides a brief discussion on theoretical issues which the Special Rapporteur considers to be important for the development of an independent and impartial judiciary. Chapter V describes standards and guidelines for judges and lawyers that have been adopted or are in the process of being adopted by various associations around the world. Chapter VI contains a brief summary of judicial decisions asserting the importance of and the principle of judicial independence. Chapter VII contains brief summaries of urgent appeals and communications to and from governmental authorities, along with observations of the Special Rapporteur. Chapter VIII contains the conclusions and recommendations of the Special Rapporteur.

I. TERMS OF REFERENCE

3. At its fiftieth session, the Commission on Human Rights, in resolution 1994/41, noting both the increasing frequency of attacks on the independence of judges, lawyers and court officials and the link which exists between the weakening of safeguards for the judiciary and lawyers and the gravity and frequency of violations of human rights, requested the Chairman of the Commission to appoint, for a period of three years, a special rapporteur whose mandate would consist of the following tasks:

(a) To inquire into any substantial allegations transmitted to him or her and report his or her conclusions thereon;

(b) To identify and record not only attacks on the independence of the judiciary, lawyers and court officials but also progress achieved in protecting and enhancing their independence, and make recommendations including the provision of advisory services or technical assistance when they are requested by the State concerned;

(c) To study, for the purpose of making proposals, important and topical questions of principle with a view to protecting and enhancing the independence of the judiciary and lawyers.

4. Without substantially changing the mandate, the Commission endorsed in its resolution 1995/36 the decision of the Special Rapporteur to use, beginning in 1995, the short title "Special Rapporteur on the independence of judges and lawyers".

5. In resolutions 1995/36, 1996/34, 1997/23, 1998/35, 1999/31 and 2000/42 the Commission on Human Rights took note of the annual reports of the Special Rapporteur, expressing appreciation of his working methods, and requested him to submit another annual report on the activities relating to his mandate to the Commission on Human Rights.

6. Several resolutions adopted by the Commission on Human Rights at its fifty-sixth session are also pertinent to the mandate of the Special Rapporteur and have been taken into consideration in examining and analysing the information brought to his attention with regard to various countries. These resolutions are, in particular:

(a) Resolution 2000/13 on women's equal ownership of, access to and control over land and the equal rights to own property and to adequate housing, in which the Commission encouraged all human rights treaty bodies, special procedures and other human rights mechanisms regularly and systematically to take a gender perspective into account in the implementation of their mandates;

(b) Resolution 2000/29 on hostage-taking, in which the Commission urged all thematic special rapporteurs and working groups to continue to address, as appropriate, the consequences of hostage-taking in their forthcoming reports to the Commission;

(c) Resolution 2000/30 on human rights and terrorism, in which the Commission urged all relevant human rights mechanisms and procedures, as appropriate, to address the consequences of the acts, methods and practices of terrorist groups in their forthcoming reports to the Commission;

(d) Resolution 2000/38 on the right to freedom of opinion and expression, in which the Commission invited the working groups, representatives and special rapporteurs of the Commission on Human Rights to pay attention, within the framework of their mandates, to the situation of persons detained, subjected to violence, ill-treated or discriminated against for having exercised the right to freedom of opinion and expression as affirmed in the relevant human rights instruments;

(e) Resolution 2000/39 on human rights in the administration of justice, in particular juvenile justice, in which the Commission called upon all special rapporteurs, special representatives and working groups of the Commission to continue to give special attention to questions relating to the effective protection of human rights in the administration of justice, including juvenile justice, and to provide, wherever appropriate, specific recommendations in this regard, including proposals for advisory service and technical assistance measures;

(f) Resolution 2000/40 on the incompatibility between democracy and racism, in which the Commission invited the mechanisms of the Commission and the treaty bodies to continue to pay particular attention to violations of human rights stemming from the rise of racism and xenophobia in political circles and society at large, especially as regards their incompatibility with democracy;

(g) Resolution 2000/52 on the rights of persons belonging to national or ethnic, religious and linguistic minorities, in which the Commission called upon special representatives, special rapporteurs and working groups of the Commission to continue to give attention, within their respective mandates, to situations involving minorities;

(h) Resolution 2000/68 on impunity, in which the Commission invited the special rapporteurs and other mechanisms of the Commission to continue to give due consideration to the issue of impunity in the discharge of their mandates;

(i) Resolution 2000/85 on the rights of the child, in which the Commission recommended that, within their mandates, all relevant human rights mechanisms, in particular special rapporteurs and working groups, regularly and systematically take a child's rights perspective into account in the implementation of their mandates, especially by paying attention to particular situations in which children are in danger and where their rights are violated, and that they take into account the work of the Committee on the Rights of the Child;

(j) Resolution 2000/86 on human rights and thematic procedures, in which the Commission requests the thematic special rapporteurs, representatives, experts and working groups:

(i) To make recommendations for the prevention of human rights violations;

(ii) To follow closely and reflect in their reports progress made by Governments in the investigations carried out within their respective mandates;

(iii) To continue close cooperation with relevant treaty bodies and country rapporteurs;

(iv) To include in their reports information provided by Governments on follow-up action, as well as their own observations thereon, including in regard to both problems and improvements, as appropriate;

(v) To include regularly in their reports gender-disaggregated data and to address the characteristics and practice of human rights violations under their mandates that are specifically or primarily directed against women, or to which women are particularly vulnerable, in order to ensure the effective protection of their human rights;

(vi) To address also in their reports the characteristics and practice of human rights violations under their mandates that are specifically or primarily directed against children, or to which children are particularly vulnerable, in order to ensure the effective protection of their human rights, and, if possible, to include also age-disaggregated data.

The resolution also requested the thematic rapporteurs, representatives, experts and working groups to include in their reports comments on problems of responsiveness and the result of analyses, as appropriate, in order to carry out their mandates even more effectively, and to include also in their reports suggestions as to areas where Governments might request relevant assistance through the programme of advisory services administered by the Office of the High Commissioner for Human Rights.

II. METHODS OF WORK

7. The Special Rapporteur, in the seventh year of his mandate, continued to follow the methods of work described in his first report (E/CN.4/1995/39, paras. 63-93).

III. ACTIVITIES OF THE SPECIAL RAPPORTEUR

A. Consultations

8. The Special Rapporteur visited Geneva for his first round of consultations from 2 to 8 April 2000 in order to present his report to the Commission at its fifty-sixth session, and returned to Geneva from 17 to 21 April after attending a workshop on judicial integrity in Vienna. During this period the Special Rapporteur met with representatives of the regional groups to brief them on his work and to answer any questions they might have. He also held consultations with representatives of the Governments of Saudi Arabia and South Africa. In addition, he held a briefing for interested non-governmental organizations and also met individually with several NGOs.

9. The Special Rapporteur visited Geneva from 28 May to 11 June 2000 for his second round of consultations and to attend the 7th meeting of special rapporteurs/representatives, experts and chairpersons of working groups of the special procedures of the Commission on Human Rights and of the advisory services programme, which was held from 5 to 9 June 2000. The Special Rapporteur also attended the Expert Consultation Workshop on Special Procedures and the Treaty Bodies: Forging New Relationships, organized by the Carter Center and the Jacob Blaustein Institute, which was held on 1 and 2 June 2000. During his visit, the Special Rapporteur met with the Permanent Representative of France to the United Nations Office at Geneva.

10. The Special Rapporteur again visited Geneva from 10 to 14 October for consultations. During the visit the Special Rapporteur met with the Permanent Representatives of Egypt, Saudi Arabia and Zimbabwe.

11. The Special Rapporteur travelled to Geneva on 24 November 2000, in order to prepare for the mission to Slovakia which took place from 27 to 30 November 2000. On 24 November 2000, the Special Rapporteur met with the Permanent Representative of Lebanon.

B. Missions/visits

12. During 2000, the Special Rapporteur undertook three in situ missions. The first mission, to South Africa, took place from 7 to 13 May 2000. The second mission, to Belarus, took place from 12 to 17 June 2000. Owing to the urgency of the situation the Special Rapporteur also conducted a short mission to Slovakia from 27 to 29 November 2000. The reports of these missions, containing his findings, conclusions and recommendations, can be found in addenda to the present report. During the year the Special Rapporteur also travelled to Indonesia from 30 August to 2 September 2000 and from 13 to 15 September 2000 to observe the proceedings in the trial of H.M. Soeharto.

13. During the period under review the Special Rapporteur informed the Government of Zimbabwe of his wish to carry out an in situ investigation. At the fifty-sixth session of the Commission of Human Rights the Government of Zimbabwe indicated its willingness to facilitate such a mission. Details are currently being negotiated. In conjunction with the Special Rapporteur on extrajudicial, summary or arbitrary executions and the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, he informed the Governments of India and Pakistan of his wish to carry out a joint in situ investigation. He also reminded the Government of Egypt of his previous requests to undertake a mission.

14. The Special Rapporteur informed the Government of Mexico on 13 September 2000 of his wish to delay the conduct of the mission to Mexico until 2001. The Special Rapporteur felt that owing to the significant political changes that were taking place in the country due to the election of a new Government, it was most desirable that the mission take place after the new Government assumes office.

15. During his visit to Geneva from 10 to 14 October 2000, the Special Rapporteur met with the Permanent Representative of Saudi Arabia, who reiterated his Government's support for the conduct of an in situ mission this year. Details and the dates are being discussed with the Permanent Mission.

C. Communications with governmental authorities

16. During the period under review, the Special Rapporteur transmitted five urgent appeals to the following States: Brazil, Jamaica, Slovakia (2) and United States of America.

17. Seeking to avoid unnecessary duplication of the activities of other thematic and country rapporteurs, the Special Rapporteur has joined during the past year with other special rapporteurs and working groups to transmit seven urgent appeals on behalf of individuals to the Governments of the following six countries: Algeria, together with the Special Rapporteur on torture and the Special Rapporteur on violence against women; Argentina, together with the Special Rapporteur on extrajudicial, summary or arbitrary executions; Colombia, together with the Special Rapporteur on extrajudicial, summary or arbitrary executions; Democratic Republic of the Congo (2), together with the Special Rapporteur on the situation of human rights in the Democratic Republic of Congo, the Special Rapporteur on torture and the Special Rapporteur on

the promotion and protection of the right to freedom of opinion and expression; Israel, together with the Special Rapporteur on torture; Lebanon, together with the Special Rapporteur on the promotion and protection of the right to freedom of expression and opinion.

18. The Special Rapporteur transmitted 42 communications to the governmental authorities of the following: Australia, Azerbaijan (2), Bahrain, Belarus, Brazil (2), Chile, China, Colombia (2), Egypt, Guatemala (4), Indonesia, Israel, Jamaica, Kenya, Lebanon, Malaysia, Mexico (3), Nepal, Pakistan (4), Palestine, Panama, Spain (2), Sri Lanka (2), United Kingdom of Great Britain and Northern Ireland (2), United States of America, Yemen and Yugoslavia (2). The Special Rapporteur also sent two joint interventions to the Islamic Republic of Iran, together with the Special Representative on the situation of human rights in the Islamic Republic of Iran, and Senegal, together with the Special Rapporteur on torture.

19. The Special Rapporteur received replies to urgent appeals from the Governments of: Algeria, Argentina, Brazil, Cameroon, Colombia, Lebanon, Slovakia, and United States of America.

20. Replies to communications were received from the governmental authorities of: Australia, Azerbaijan, Bahrain, Belarus, Brazil, China, Colombia, Egypt, Gambia, Kenya, Malaysia, Mexico, Nepal, Palestine, Panama, Peru, Senegal, Spain, Sri Lanka, United Kingdom of Great Britain and Northern Ireland, United States of America and Yemen. Other communications were received from the Governments of Azerbaijan, Colombia and Guatemala.

D. Cooperation with intergovernmental and non-governmental organizations

21. The Special Rapporteur has continued the dialogue with intergovernmental and non-governmental organizations in the implementation of his mandate and thanks these organizations for their cooperation and assistance during the year.

E. Cooperation with other United Nations procedures and bodies

1. Special rapporteurs and working groups of the Commission on Human Rights

22. The Special Rapporteur has continued to work closely with other special rapporteurs and working groups. As previously indicated, in order to avoid duplication he has, where appropriate, made joint interventions with other special rapporteurs and/or working groups. On issues relevant to his mandate, the Special Rapporteur makes reference in the present report to reports of other special rapporteurs and working groups.

2. The Centre for International Crime Prevention

23. In his third, fourth, fifth and sixth reports (E/CN.4/1997/32, paras. 26-37; E/CN.4/1998/39, paras. 23-24; E/CN.4/1999/60, paras. 28-34; E/CN.4/2000/61, paras 23-24), the Special Rapporteur referred to the importance of the work done by the Centre for

International Crime Prevention in overseeing the implementation of the Basic Principles on the Independence of the Judiciary. The Special Rapporteur regrets that he was unable to attend the ninth session of the Commission on Crime Prevention and Criminal Justice in April 2000. However, he continued to receive assistance from the secretariat as and when needed with regard to standards.

24. The Special Rapporteur has been informed that the tenth session of the Commission on Crime Prevention and Criminal Justice in May 2001 will consider the status of the implementation of the Basic Principles on the Independence of the Judiciary. The Special Rapporteur will continue to liaise with the United Nations Office for Drug Control and Crime Prevention (UNODCCP) with respect to this matter.

25. As stated in his fifth report (E/CN.4/2000/61, para. 24) the Special Rapporteur received an invitation from the Executive Director of UNODCCP to attend the Tenth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Vienna in April 2000. The Special Rapporteur regrets that he was unable to attend.

3. Activities and Programmes Branch of the Office of the High Commissioner for Human Rights

26. As mentioned in his third, fourth, fifth and sixth reports (E/CN.4/1997/32, para. 31; E/CN.4/1998/39, para. 26; E/CN.4/1999/60, para. 35; E/CN.4/2000/61, para. 25), the Special Rapporteur is collaborating with the Activities and Programmes Branch of the Office of the High Commissioner for Human Rights to develop a training manual for judges and lawyers in the context of the United Nations Decade for Human Rights Education. The Special Rapporteur apologizes for having been unable to devote sufficient time to this project.

4. Promotional activities

27. As stated in his third, fourth, fifth and sixth reports, the Special Rapporteur considers the promotion of the importance of the independence of the judiciary and the legal profession and the respect of the rule of law in a democratic society, in the spirit of the Vienna Declaration and Programme of Action, to be an integral part of his mandate. In this regard, the Special Rapporteur continued to receive invitations to address legal forums, seminars and conferences. Owing to other commitments, the Special Rapporteur could not accept all the invitations. Nevertheless, he did accept the following invitations:

(a) From 15 to 16 April 2000 to attend and observe a workshop of the Judicial Group for the Strengthening of Judicial Integrity in Vienna. The workshop was organized within the framework of the Global Programme against Corruption and in conjunction with the Tenth United Nations Congress on the Prevention of Crime and the Treatment of Offenders. Ten Chief Justices from Asia and Africa or their representatives participated in the workshop;

(b) On 24 June 2000 to deliver the keynote address at the Conference on Human Rights Defenders in Dublin. The conference was organized by the Irish Council for Civil Liberties;

(c) From 6 to 8 October 2000 to participate and address the Amnesty International World Lawyers' meeting on the theme "Defending human rights" in Belfast, Northern Ireland;

(d) On 28 October 2000 to deliver the keynote address at a symposium on "Mandatory sentencing - rights and wrongs" organized by the University of New South Wales in Sydney, Australia;

(e) On 1 and 2 December 2000 to participate in an expert seminar on the implementation of the mandate of the Special Representative on human rights defenders, held in Cartigny, Geneva, organized by the International Service for Human Rights;

(f) From 26 to 28 January 2001 to participate in a meeting on the Princeton Project on Universal Jurisdiction, held at Princeton University. The meeting is sponsored by Princeton University, the Woodrow Wilson School of Public and International Affairs, the International Commission of Jurists, the Urban Morgan Institute for Human Rights of the University of Cincinnati and the Netherlands Institute for Human Rights.

(g) From 24 to 26 February 2001 to attend and observe the second workshop of the Judicial Group on Strengthening Judicial Integrity in Bangalore, India.

IV. THEORETICAL ISSUES

A. Judicial corruption

28. In his sixth report to the Commission on Human Rights (E/CN.4/2000/61, paras. 29-30) the Special Rapporteur drew attention to the growing concerns expressed over judicial corruption. The expressions of concern continued during the year and can be seen in the calls for greater judicial accountability in many countries. Calls for formal mechanisms to deal with complaints against judges are also growing. It is in this context the Special Rapporteur intends to focus greater attention on promoting judicial integrity and accountability which will strengthen judicial independence and public confidence in the judiciary.

29. The Special Rapporteur will continue to work closely with the organizations and institutions that are currently addressing this issue. The Special Rapporteur has discussed this issue with the High Commissioner who has acknowledged its importance and affirmed that the matter will be followed closely by her Office.

B. Human rights defenders

30. The Special Rapporteur welcomes Commission resolution 2000/61 in which the Commission requested the Secretary-General to appoint a Special Representative to report on the situation of human rights defenders in all parts of the world. The Special Rapporteur will work closely with the Special Representative in the defence of human rights defenders who are lawyers acting in the discharge of their professional duties.

V. STANDARDS

International Association of Prosecutors

31. In April 2000, the Special Rapporteur met the Executive Council of the International Association of Prosecutors in Vienna and had discussions on further cooperation with that Association in the implementation of the Association's Standards of Professional Responsibility and its Statement of the Essential Duties and Rights of Prosecutors.

32. The Special Rapporteur continues to refer in his interventions and reports to regional standards, particularly those of the Council of Europe and LAWASIA (E/CN.4/1996/37, paras. 86-91, E/CN.4/1997/32, para. 49, E/CN.4/1999/60, paras. 43-49, E/CN.4/2000/61, paras. 33-35).

VI. JUDICIAL DECISIONS REFLECTING THE INDEPENDENCE AND IMPARTIALITY OF THE JUDICIARY

33. The Special Rapporteur welcomes the judgement of the Supreme Court of Bangladesh on 2 December 1999 in the case of Government of Bangladesh and Others v. Md. Masdan Hossain and Others. (Supreme Court of Bangladesh, Appellate Division, Civil Appeal No. 79 of 1999.) In its judgement the Court ordered, inter alia, the separation of the subordinate judiciary from the executive so as to make the subordinate judiciary fully independent of the executive. In its lengthy judgement the Court analysed the essential elements of judicial independence and in doing so applied some of the leading judgements on the subject from appellate courts of other jurisdictions, particularly Canada. This judgement stands out as a landmark and should serve as a precedent for courts in other countries to follow, particularly those in the Commonwealth, in order to provide for an independent judiciary.

VII. SITUATIONS IN SPECIFIC COUNTRIES OR TERRITORIES

34. This chapter contains brief summaries of the urgent appeals and communications transmitted to governmental authorities between 30 November 1999 and 30 November 2000, as well as of replies to the allegations received between 24 December 1999 and 24 December 2000. In addition, the Special Rapporteur takes note in this chapter of the activities of other mechanisms which are related to his mandate. Where he has deemed it necessary, the Special Rapporteur has included his own observations. He wishes to emphasize that the appeals and communications reflected in this chapter are based exclusively upon information that has been transmitted to him directly. Where information was insufficient, the Special Rapporteur was not in a position to act. He also recognizes that problems concerning the independence and impartiality of the judiciary are not confined to the countries and territories mentioned in this chapter. In this regard, he wishes to emphasize that readers of the present report should not interpret the omission of a particular country or territory from this chapter as indicating that the Special Rapporteur considers that there are no problems with the judiciary in that country or territory.

35. In preparing this report, the Special Rapporteur has taken note of the reports submitted to the Commission by the country special rapporteurs/representatives and independent experts.

Algeria

Communication to the Government

36. On 25 January 2000, the Special Rapporteur sent a joint urgent appeal with the Special Rapporteur on torture and the Special Rapporteur on violence against women concerning the case of Nadhéra Mesbah. Ms. Nesbah was arrested on 19 December 1999 after being accused of fraud by one of her clients and placed in detention. Ms. Nesbah was pregnant at the time and suffered from diabetes. Her request for release on medical grounds was refused on 18 January and the trial was delayed until 25 January 2000.

Communication from the Government

37. On 8 February 2000 the Government replied to the allegation concerning Nadhéra Mesbah. The Government stated that Ms. Mesbah had been arrested for corruption. It was alleged that Ms. Mesbah had informed a client that, for a payment of 6 million Algerian dinars, Ms. Mesbah could secure leniency from the judge hearing the case. A complaint was lodged with the police and Ms. Mesbah was arrested in possession of the money. On 20 December 1999, Ms. Mesbah, despite her pregnancy, was placed in detention. On 25 January 2000, she was sentenced to 18 months imprisonment and fined 20,000 Algerian dinars. Ms. Mesbah has appealed. Because of her ill-health she was placed under surveillance in the civil medical hospital in Blida. On 18 February the Government informed the Special Rapporteur that Ms. Mesbah was provisionally released after her appearance before the court at Bilda on 9 February 2000.

Observation

38. The Special Rapporteur thanks the Government for its response.

Argentina

Communication to the Government

39. On 31 October 2000, the Special Rapporteur sent a joint urgent appeal with the Special Rapporteur on extrajudicial, summary and arbitrary executions concerning lawyers Carlos Varela, Diego Lavado and Alejandro Acosta. The three lawyers have faced harassment since taking two cases in which police officers are accused of killing people in their custody. In June 2000, defamatory statements about the lawyers were circulated in the press. In August 2000, they received threatening phone calls and on 24 October 2000, their offices were broken into and files were stolen. An anonymous phone call later claimed that the Mendoza Investigations Police were responsible for the break-in.

Communication from the Government

40. On 21 December 2000, the Permanent Mission of Argentina to the United Nations Office at Geneva sent a note verbale to the Special Rapporteur regarding the case of Carlos Varela, Diego Lavado and Alejandro Acosta. The Government informed the Special Rapporteur that the police had opened an investigation into the break-in into the lawyers' offices. Further, security measures had been taken and until the cases were resolved the police would patrol the area at night and during weekends. It had also been suggested that a uniformed guard should be stationed outside the offices in order to provide better security.

Observation

41. The Special Rapporteur thanks the Government for its response.

Australia

Communication to the Government

42. On 14 November 2000, the Special Rapporteur sent a communication to the Government concerning alleged statements by the Chief Minister of the Northern Territory, Mr. Denis Burke. The Special Rapporteur had been informed that the Chief Minister had called for a Northern Territory magistrate to resign after he had stated from the bench that he agreed with a defence lawyer's criticism of mandatory sentencing laws in the context of the case being heard.

Communication from the Government

43. On 21 December 2000, the Government acknowledged receipt of the Special Rapporteur's communication.

Observation

44. The Special Rapporteur awaits a response from the Government.

Azerbaijan

Communications to the Government

45. On 25 February 2000, the Special Rapporteur sent a communication to the Government concerning the Azerbaijan Bar Association (ABA) which submitted an application for registration as an NGO on 18 June 1999 but was denied registration on 4 August 1999 and again on 19 November 1999. The reason given for the refusal was that the organization could not be registered until the draft Law on the Legal Profession had been passed.

46. On 25 February 2000, the Special Rapporteur sent a communication to the Government concerning a lawyer, Aslan Ismailov, who had been dismissed from the Bar Association on 18 March 1999, following a visit to the United States of America. It was alleged that Mr. Ismailov was dismissed because during his visit he directly contradicted statements by the Minister of Justice and the President's Legal Adviser, who were visiting the United States at the same time.

Communications from the Government

47. On 2 June 2000, the Government responded to the allegations regarding the ABA. The Government stated that the documents provided by the ABA in support of its application for registration were inconsistent with section I, articles 4 and 9, of the Law on Lawyers and their Activities which states that the activities of lawyers cannot be carried out by individuals who are not members of the Bar Association. As the founders of the ABA were not members of the Bar Association and did not exercise the functions of lawyers, they could not establish such an organization.

48. On 2 June 2000, the Government responded to the allegations regarding Mr. Ismailov. The Government stated that Mr. Ismailov while a member of the Bar Association had founded a private law firm and engaged in entrepreneurial activities. Mr. Ismailov repeatedly refused requests by the Presidium of the Bar Association to explain his activities. Following an investigation, the Presidium of the Bar Association on 18 March 1999 ordered Mr. Ismailov to cease those of his activities which were in violation of the regulations on the simultaneous pursuit of legal activities and entrepreneurial activities. Following his refusal, the Presidium of the Bar Association revoked Mr. Ismailov's membership. Mr. Ismailov appealed but the decision of the Presidium was upheld in all the higher courts.

49. On 16 October 2000, the Government sent a document detailing recent judicial and legal reforms.

Observation

50. The Special Rapporteur thanks the Government for its responses. He is unable to express a view as to whether there has been a breach of the Basic Principles on the Role of Lawyers.

Bahrain

Communication from the Government

51. On 7 February 2000, the Government sent a communication in response to an urgent appeal of the Special Rapporteur dated 6 July 1999 (E/CN.4/2000/61, paras. 46-49). The Government stated that Mr. Al-Jamri had been convicted by the High Court of Appeal on 7 July 2000 on various criminal charges and sentenced to 10 years' imprisonment. Mr. Al-Jamri was represented by four lawyers of his own choosing, the case was heard by three civilian judges, and the trial was conducted fairly. On 8 July 2000, after a public apology, Mr. Al-Jamri was pardoned by His Highness the Amir and released from custody.

Observation

52. The Special Rapporteur thanks the Government for its response. He has not heard further from the source who sent the original complaint.

Belarus

Communication to the Government

53. On 6 June 2000, the Special Rapporteur sent a communication to the Government concerning the recent burglaries of the offices of well-known human rights lawyers, including those of Ms. Vera Stremkovskaya and Mr. Oleg Volchek. On 29 May 2000, unknown persons broke into the office of the Human Rights Centre, of which Ms. Stremkovskaya is a director, and stole various items, including computers, documents and human rights literature. It was alleged that breaking into human rights organizations had become a common practice in Belarus. Mr. Volchek's organization, Legal Assistance to the Population, was also burgled in May 2000.

Communication from the Government

54. On 28 July 2000, the Government responded to the Special Rapporteur's communication. The Government stated that reports had been filed with the District Internal Affairs Departments and that investigations were being carried out. The investigations involved a full inspection of the scene of the crime, the interviewing of inhabitants of the buildings where the offices are situated, and attempts to trace the stolen goods. A number of individuals are being investigated for complicity but it is not yet established who committed the crimes. The investigations are being monitored by the State Procurator.

Observation

55. The Special Rapporteur thanks the Government for its response. While on mission in Belarus the Special Rapporteur expressed his concern about this matter to the Minister for Foreign Affairs.

Brazil

Communications to the Government

56. On 5 June 2000, the Special Rapporteur sent a communication to the Government concerning the situation of lawyer Valdenia Aparecida Paulino. The Special Rapporteur had received information stating that Ms. Aparecida Paulino had been the subject of threats in connection with her representation of the families of two people who had allegedly been killed by police officers. It was alleged that two military police officers had approached a witness in the case and told him to take a message to Ms. Aparecida Paulino warning her "to take care".

57. On 16 June 2000, the Special Rapporteur sent an urgent appeal to the Government concerning the situation of lawyer Henri Burin des Roziers. The name of Mr. Burin des Roziers had been included on a list of people "destined for death" which had been circulated publicly. This was allegedly in connection with his representation of the movement Peasants Without Land, five members of which had been executed recently.

58. On 26 October 2000, the Special Rapporteur sent a follow-up communication to the Government noting that a response had not been received to the communications dated 26 April 1999 (E/CN.4/2000/61, para. 83), 30 August 1999 (E/CN.4/2000/61, para. 85) and 5 June 2000. The Special Rapporteur also requested an update on the situation of lawyer Joilce Gomes Santana.

Communications from the Government

59. On 19 June 2000, the Government replied to the allegations concerning Henri Burin des Roziers. The Government stated that on 21 May 2000, the Ministry of Justice requested the Director General of the Federal Police to present a report on violence related to the land conflict in the area under the jurisdiction of the 17th squad of the Military Police of Para State. Further, on 31 May 2000 the Minister of Justice appointed Percilio de Souza Lima and Maria Eliane Menezes de Farias, members of the Council for the Protection of the Rights of the Human Person, to follow the trial of Jeronimo Alves do Amorim. Mr. Burin des Roziers was legal counsel for the prosecution in that case. On 6 June 2000 the trial was held, Mr. Alves do Amorim was convicted and received a sentence of 19 years and 6 months.

60. On 23 June 2000, the Government replied to the communications of 30 August and 16 November 1999. The Government confirmed that lawyer Jolice Gomes Santana had received threats, and stated that the Ministry of Justice had offered to place her under the Federal Programme of Assistance to Victims and Threatened Victims. The Ministry of Justice also instructed the Federal Police to follow up her case.

Observations

61. The Special Rapporteur thanks the Government for its responses. In the case of Henri Burin des Roziers, the Government has not responded to the allegation concerning the threat to the lawyer.

Burundi

62. The Special Rapporteur has taken note of the report to the General Assembly of the Special Rapporteur of the Commission of Human Rights on the situation of human rights in Burundi (A/55/358). The report stated (paras. 75-82) that there is a serious problem with the slowness of the administration of justice and there was a rising incidence of corruption amongst judicial officials. In order temporarily to remedy this situation, the Ministry of Justice had sought to strengthen the Prosecutor's Office at the Court of Appeals by assigning teams of judges to speed up the investigation of cases. However, the report also noted that the ethnic imbalance in the judiciary and the bar still exists, although the proposed creation of a Higher School of the Magistrature would be a step towards alleviating this problem.

Observation

63. The Special Rapporteur will continue to liaise with the Special Rapporteur on the situation of human rights in Burundi.

Cameroon

Communication from the Government

64. On 22 August 2000, the Government replied to a joint urgent appeal dated 26 October 1999, regarding the trial of Mr. Edwin Jumbien, Mr. Hassan Jumban and Mr. Simon Ngekqwei (E/CN.4/2000/61, paras. 93-97). The Government stated that the individuals concerned were tried by a military tribunal in connection with armed attacks in Bamenda in 1997, in accordance with Cameroonian positive law which states that crimes committed with the use of a firearm are in the first instance a matter for military tribunals, irrespective of the status of the individual. On 5 October 1999 they were sentenced to life imprisonment by the military tribunal in Yaoundé. The Government also stated that the individuals were assisted by a number of lawyers of their own choosing.

Observations

65. The Special Rapporteur thanks the Government for its response. He expresses concern over the law which permits trials of civilians by military courts.

Chile

Communication to the Government

66. On 26 October 2000, the Special Rapporteur sent a follow-up communication to the Government noting that a response had not been received to the communication dated 21 May 1999 (E/CN.4/2000/61, para. 99).

Observation

67. The Special Rapporteur awaits the Government's response.

China

Communication to the Government

68. On 3 February 2000, the Special Rapporteur sent a communication to the Government requesting a copy of a directive issued by the President of the People's Supreme Court to all judges of provincial and military courts to curb nepotism and corruption amongst judges.

Communications from the Government

69. On 22 March 2000, the Government responded to the Special Rapporteur's communication of 19 November 1999 (E/CN.4/2000/61, paras. 103-104) concerning the Falun Gong. The Government stated that in cases against the Falun Gong tried in Beijing, the individuals concerned were represented by lawyers of their choosing, who conducted the defence independently. The request by the Beijing Bureau of Justice for figures from legal offices on requests for consultations related to Falun Gong was of no special significance and was a matter of normal professional guidance and administrative routine related to work statistics.

70. On 16 May 2000 the Government sent a copy of the Provisional Rules for the Conduct of Unlawful Trials by Judicial Personnel of the People's Courts, in response to the Special Rapporteur's communication of 3 February 2000.

Observations

71. The Special Rapporteur thanks the Government for its responses. The notice issued by the Beijing Bureau of Justice on 29 July 1999 in connection with the Falun Gong cases could be seen to be in breach of principle 16 of the Basic Principles on the Role of Lawyers as constituting an improper interference with the performance of the functions of lawyers.

72. The Special Rapporteur welcomes the directive of the President of the People's Supreme Court to curb judicial corruption and improprieties.

Colombia

Communications to the Government

73. On 23 May 2000, the Special Rapporteur sent a joint urgent appeal with the Special Rapporteur on extrajudicial, summary and arbitrary executions regarding lawyer Alirio Uribe Múñoz. It was alleged that the name Mr. Uribe Múñoz, a member of the José Alvear Restrepo Lawyers Collective, had appeared on a paramilitary death list that was circulated on 5 May 2000, on a leaflet alleging an imminent paramilitary offensive in Bogota. Mr. Uribe Múñoz, had reportedly been described as a guerrilla collaborator in a Colombian army intelligence report.

74. On 16 June 2000, the Special Rapporteur sent a communication to the Government concerning the investigations into the death of Nydia Erika Bautista, after she was abducted by soldiers in 1987. A Constitutional Court decision in 1997 had ruled that cases of human rights violations should be excluded from military courts, in accordance with United Nations recommendations. It was alleged that a decision of a military court had ordered the exhumation of the remains of Ms. Bautista. The family of Ms. Bautista filed a petition with a civil judge requesting suspension of that order on the basis of concerns about the independence and impartiality of the military tribunal. A petition had also been lodged with the Constitutional Court requesting the case to be transferred to the ordinary court system.

75. On 26 October 2000, the Special Rapporteur sent a follow-up communication to the Government noting that a response had not been received to the communication dated 18 May 1999 (E/CN.4/2000/61, para. 118).

Communications from the Government

76. On 29 May 2000, the Government responded to the Special Rapporteur's urgent appeal concerning Alirio Uribe Múñoz. The Government stated that the National Police had made arrangements to protect Mr. Uribe Múñoz's life after learning of a report being submitted on the matter to the Inter-American Commission on Human Rights. A security study was conducted in coordination with the Bogota Metropolitan Police and the Ministry of the Interior was contacted so the case could be studied by the Ministry's Regulations and Risk Evaluation Committee. The Government stated it would inform the Special Rapporteur about the outcome of the investigations.

77. On 19 July 2000, the Government responded to the Special Rapporteur's communication regarding the investigations into the death of Nydia Erika Bautista. The Government stated that on 18 February 2000 the Military High Court confirmed the court order refusing the transferral of the case to the ordinary courts. At the request of the claimant, the Military Court of Investigation was given responsibility for conducting DNA tests.

78. With respect to the petition to the Constitutional Court, the Government stated that the Constitutional Court had issued its decision on 29 June 2000. The Court overruled the decision of the Criminal Division of the Supreme Court of Justice and annulled a court order dated 14 November 1996 by the Disciplinary Division of the Supreme Council of the Judiciary. The latter decision resolved the conflict of jurisdiction between the Office of the Public Prosecutor and the 20th National Army Brigade in favour of the military. The Constitutional Court ordered the Disciplinary Division of the Supreme Council of the Judiciary to issue a new order.

79. The Government also stated that it considered it to be inappropriate to make sweeping judgements about the unsuitability of the military criminal justice system, and that the effectiveness of trials taking place before military criminal courts should be judged on a case-by-case basis. Also, the military criminal courts had transferred to the ordinary court system a total of 529 cases in the last three years, some of which had concerned human rights violations.

80. On 4 August 2000, the Government supplied supplementary information concerning Nydia Erika Bautista. The Disciplinary Chamber of the Supreme Council of the Judiciary ruled on 21 July 2000, that the ordinary criminal courts had jurisdiction in this case.

81. On 21 December the Government replied to the Special Rapporteur's communication of 26 October 2000 regarding proposed legislation which would provide for the continuation of the use of faceless judges and prosecutors and secret witnesses in terrorism, torture, drug trafficking and illicit enrichment-related criminal trials, and which would provide for detention without trial. Law No. 504 of 25 June 1999, in force as of 1 July 1999, developed the

constitutional principles of fair trial and independence of the judiciary. This law limited the use of faceless judges and prosecutors and secret witnesses to very specific cases. However, by judgement C 392/2000, the Constitutional Court declared these provisions unconstitutional.

82. The Government also sent the following documents during the year on human rights in Colombia; Public Force and Human Rights in Colombia on 11 April 2000; Policy on Human Rights and International Humanitarian Law Progress Report on 24 July 2000; and Colombia Human Rights Observatory on 22 August 2000 and 17 October 2000.

Observations

83. The Special Rapporteur thanks the Government for its responses. He is waiting to hear the outcome of the investigations into the Alirio Uribe Múñoz case. Conflict between the respective jurisdictions of the military courts and ordinary courts have been a problem which the Special Rapporteur addressed in his mission report.

84. The Special Rapporteur welcomes the judgement of the Constitutional Court declaring the use of faceless judges and prosecutors and secret witnesses in terrorism, torture, drug trafficking and illicit enrichment-related criminal trials, unconstitutional.

Democratic Republic of the Congo

Communications to the Government

85. On 10 May 2000, the Special Rapporteur sent a joint urgent appeal with the Special Rapporteur on the situation of human rights in the Democratic Republic of the Congo, the Special Rapporteur on torture and the Special Rapporteur on the promotion and protection of the freedom of opinion and expression regarding the situation of Freddy Loseke Lisunbu La Yayenga. Mr. Loseke Lisunbu, editor of La Libre Afrique, was detained on 31 December 1999 and taken to Kokolo military camp where, it was alleged, he was subjected to torture. On 3 May 2000 he was brought before a military court and accused of spreading false information and insulting the army, charges that can carry a sentence of 10 years' imprisonment.

86. On 16 November 2000, the Special Rapporteur sent a joint urgent appeal with the Special Rapporteur on the situation of human rights in the Democratic Republic of the Congo regarding the trial of four journalists by a military court (Cour d'ordre militaire). Emile-Aimé Kakese was arrested after publishing articles that allegedly called upon the opposition to rebel against the Government. Jean-Pierre Ekanga Mukana and Richard Nsamba Olongi were arrested after they arrived in court to testify on Emile-Aimé Kakese's behalf. The lawyer representing Emile-Aimé Kakese was also jailed for complicity. The Special Rapporteurs expressed their grave concern over the continuing practice in the country, of trying civilians in military courts.

Observation

87. The Special Rapporteur expresses concern over the continued failure of the Government to respond to his communications.

Egypt

Communication to the Government

88. On 8 May 2000, the Special Rapporteur sent a follow-up letter regarding the situation of the Egyptian Bar Association (E/CN.4/2000/61/paras. 143-147). The Special Rapporteur expressed his concern that elections still had not been held for the Administrative Council of the Bar despite a ruling by the Court of Appeal on 13 July 1999 ordering that those elections take place.

Communications from the Government

89. On 12 October 2000, the Government sent a communication regarding a decision of the Egyptian Constitutional Court of June 2000. The Court found Law No. 153 of 1999, concerning non-governmental organizations, to be invalid on procedural grounds. The decision affirmed an individual's right to form an association as being an indivisible part of his/her personal freedom.

90. On 19 October 2000, the Government sent a communication regarding a decision of the Egyptian Constitutional Court of 8 July 2000 concerning the constitutionality of article 24 of Law No. 73 (1956), which allowed the appointment of persons who were not members of judicial bodies to bodies monitoring elections. The court held that the provision breached articles 3, 62, 64 and 88 of the Egyptian Constitution as it distanced the polling process from judicial supervision, and thereby removed a fundamental safeguard concerning the right to vote. The aim of judicial supervision is to "strengthen democracy and ensure that the right to vote is exercised fully and in a proper and irreproachable manner in keeping with its designated purpose which is to express the sovereignty of the people".

91. In its communication of 19 October 2000, the Government also informed the Special Rapporteur that the elections for the Administrative Council of the Egyptian Bar Association would be held after the legislative elections in October 2000.

Observations

92. The Special Rapporteur expresses concern over the delay in holding the elections for the Administrative Council of the Bar Association. The Court ruling was issued on 13 July 1999 and there appeared to be no justification for delaying the elections until after legislative elections in October 2000. The Government will be seen to be in breach of principle 24 of the Basic Principles on the Role of Lawyers.

Gambia

Communication from the Government

93. On 16 February 2000, the Government responded to the Special Rapporteur's communication of 16 November 2000 regarding Justice Robbin-Coker (see E/CN.4/2000/61, paras. 150-151). The Government stated that the letter terminating the contractual appointment of Justice Robbin-Coker was, in accordance with the law, delivered to his office and received

and signed for by his secretary on the day it was issued. Further, the Government stated that it had at no time questioned Justice Robbin-Coker with respect to any of his judicial decisions, and has complied with the orders made in the cases of the GAMTEL employees.

94. As Justice Robbin-Coker was not a citizen of the Gambia he could not be employed on a permanent basis. His letter of appointment contained some of the governing terms and conditions which included the following: "the appointment is terminable either by the Government or by yourself giving three month's notice in writing or on the payment of three month's salary in lieu of notice". By virtue of the mutual agreement to this provision, article 141 of the Constitution cannot be applied in his case. The Government also stated that there were serious allegations of corruption on the part of Justice Robbin-Coker which were adequately substantiated to the authorities. These can be supplied if required.

Observation

95. The Special Rapporteur thanks the Government for its response. He notes that judges appointed on contracts generally have no security of tenure; such judges cannot therefore be perceived to be independent.

Guatemala

Communications to the Government

96. On 22 February 2000, the Special Rapporteur sent a communication to the Government concerning the situation of lawyers Arturo Recinos, Mario A. Menchú Francisco, Luis A. Vásquez Menéndez, Luis R. Romero Rivera and Carlos N. Palencia Salazar. These lawyers had allegedly been receiving telephone death threats and threatening calls in connection with the defence of members of a kidnapping gang. The lawyers were forced to withdraw from the case for fear of their lives.

97. On 1 May 2000, the Special Rapporteur sent a communication concerning the case of a former Justice of the Peace in Santa Lucía de Utatlán, Ricardo Efraín Mogollón Mendoza. Mr. Mogollón was allegedly removed without due process by the Supreme Court in July 1998. After the Special Rapporteur conducted a mission to Guatemala in 1999, he recommended that the Supreme Court should review this case, if legally possible. Mr. Mogollón filed a request for review of his case with the Supreme Court, which was dismissed. The Special Rapporteur has been informed that a petition concerning the dismissal of Ricardo Efraín Mogollón Mendoza has been filed with the Inter-American Commission on Human Rights.

98. On 2 August 2000, the Special Rapporteur sent a communication concerning a government prosecutor, Maura Estrada Mansilla de Pérez. It was alleged that the prosecutor concerned had repeatedly failed to attend court hearings in a case involving the sexual assault of a 15-year-old street girl by a member of the Special Forces of the National Civil Police. The information received also stated that the Guatemalan Human Rights Ombudsman, José Arango Escobar, concluded that the human rights of the girl had been violated by the accused and that the prosecutor was negligent in the performance of her duties.

99. On 26 October 2000, the Special Rapporteur sent a follow-up communication to the Government noting that a response had not been received to his communications dated 22 February, 1 May and 2 August 2000.

Communication from the Government

100. On 21 July 2000, the Government sent the Special Rapporteur a copy of Government Resolution No. 310-2000. This decree amended the composition of the National Commission for Monitoring and Supporting the Strengthening of Justice, ensuring a diversity of judicial, executive and civil society representation. The decree also set out the principal objective of the Commission as being to draw up and transmit such proposals and recommendations as it may consider timely and appropriate for the comprehensive improvement of the system of justice in Guatemala and to monitor the implementation of the recommendations made in the report of the Commission on the Strengthening of Justice, together with those made by the Special Rapporteur on the independence of judges and lawyers.

Observations

101. The Special Rapporteur is awaiting the Government's response to his previous communications.

102. The Special Rapporteur welcomes the Government's commitment to implementing the recommendations outlined in the report on his mission to Guatemala (E/CN.4/2000/61/Add.1, para. 169).

Indonesia

103. On the invitation of the Attorney-General of Indonesia, the Special Rapporteur attended the South Jakarta District Court on 31 August 2000 to observe the opening of the trial of H.M. Soeharto, the former President of Indonesia. Mr. Soeharto was being tried on charges of corruption during his chairmanship of several charitable foundations while in office as President of the Republic of Indonesia.

104. The Special Rapporteur's interest in the trial stems from the principle that leaders of Governments should not enjoy any form of impunity from investigation and prosecution for crimes alleged to have been committed by them while in office. When prosecuted they should be tried before an independent and impartial tribunal applying the standards for a fair trial recognized under international law.

105. On 31 August 2000, at the commencement of the trial, Mr. Soeharto failed to appear. The court, composed of five judges, heard arguments from the counsel for Mr. Soeharto informing them that Mr. Soeharto was medically unfit to appear in court and to go through the process of the trial. To that extent the court had before it three medical reports including one of an examination conducted on Mr. Soeharto at 6 a.m. on 31 August 2000. No fewer than 31 doctors had examined Mr. Soeharto.

106. In response to the contention of the defence counsel, the prosecutor called for a second independent medical examination of Mr. Soeharto. The court, after hearing further arguments, adjourned the hearing to 14 September 2000 to hear oral medical evidence on Mr. Soeharto's fitness to appear and stand trial.

107. The Special Rapporteur met the defence counsel and the public prosecutor involved in the trial and had discussions with them. The Special Rapporteur was supplied with the medical reports by the defence counsel. In the afternoon on 31 August 2000, the Special Rapporteur met Mr. Soeharto at his residence in the presence of his doctors and lawyers.

108. The following day the Special Rapporteur met President Abdurrahman at his residence. During this meeting the Minister for Foreign Affairs and the Attorney-General were present.

109. Among the minimum guarantees of a fair trial, as provided in article 14 (1) of the International Covenant on Civil and Political Rights are:

(a) The accused has the right to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) The accused has the right to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing;

(c) The accused has the right to examine, or to have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

110. It therefore follows that what is fundamental to a fair trial, in addition to an independent and impartial tribunal, is that the accused should be mentally capable of following the trial proceedings, able to instruct his lawyers and to be able to give coherent evidence.

111. The medical reports presented to the court, while setting out the medical history and medical condition of Mr. Soeharto, who was then 79 years old, gave no indication in clear terms that Mr. Soeharto was either physically or mentally unfit to stand trial. It was this gap in the medical reports which may have led the court to adjourn the proceedings to enable it to examine the doctors orally.

112. The Special Rapporteur, in a short report to both the Attorney-General and defence counsel, drew their attention to the case of former Chilean President Augusto Pinochet and how the Secretary of State for Home Affairs of the Government of the United Kingdom of Great Britain and Northern Ireland dealt with Mr. Pinochet's lawyers' contention that he was not medically fit to stand trial. The Special Rapporteur advised that the procedure adopted by the Secretary of State in obtaining an independent medical opinion could be followed in the case of Mr. Soeharto by the South Jakarta District Court.

113. On 14 September 2000, the Special Rapporteur attended court for the adjourned hearing. The court, after hearing oral evidence, decided to call for an independent medical examination of Mr. Soeharto, to determine whether he was medically unfit to stand trial. The prosecutor appealed that decision.

Communication to the Government

114. On 26 October 2000, the Special Rapporteur sent a follow-up communication to the Government noting that a response had not been received to the communications dated 1 March 1999 and 20 July 1999 (E/CN.4/2000/61, paras. 160-162).

Iran (Islamic Republic of)

Communications to the Government

115. On 19 October 2000, the Special Rapporteur sent a joint communication with the Special Representative on the situation of human rights in the Islamic Republic of Iran regarding the trial of Ms. Shirin Ebadi and Dr. Mohsen Rahami. Bench 16 of the Tehran Public Court, on 29 September 2000, convicted Ms. Ebadi and Dr. Rahami of defamation and disseminating false information and sentenced them to a suspended period of imprisonment of 15 months. They were also suspended from legal practice for five years. It was alleged that only the Disciplinary Court of the Lawyers Association, in accordance with article 17 of the Law on the Independence of the Lawyers Association, was able to suspend a lawyer from practice.

116. The Special Rapporteurs also voiced their concern over statements attributed to Mullah Hadi Marvi, First Deputy to the Judiciary Chief Mahmoud Hashemi Shahroudi, stating that "judges must obey the Supreme Leader and have no independence in judgement".

117. The Special Rapporteur has also taken note of the report of the Special Representative on the situation of human rights in the Islamic Republic of Iran (A/55/363, paras. 32-46, 106). The report noted that although reform of the judicial system had been stated as an important objective, little progress had been made in that direction. Also, the various components of the right to a fair trial seem to be ignored by the judiciary. The Special Representative also expressed regret over the seeming inaction by the Independent Bar Association in the face of acts of intimidation of lawyers, or with respect to the conduct of the courts and the right to a fair trial.

Observation

118. The Special Rapporteur is waiting for a response from the Government.

Israel

Communications to the Government

119. On 4 February 2000, the Special Rapporteur sent a joint urgent appeal with the Special Rapporteur on torture regarding Yussuf Mohammed Jum'a Kanan, who was reportedly arrested on 18 January 2000 because he was working in a restaurant without a legal work permit.

Since that time he has been detained at the General Security Service Interrogation Unit of the Shikma Detention Centre in Ashkelon. On 20 January 2000, it was alleged that he was denied access to a lawyer and further that an order prohibiting access to counsel has been imposed.

120. On 26 October 2000, the Special Rapporteur sent a follow-up communication to the Government noting that a response had not been received to the communications dated 13 January 1999 and 4 February 2000 (E/CN.4/2000/61, paras. 167-168).

Observation

121. The Special Rapporteur is waiting for a response from the Government.

Jamaica

Communication to the Government

122. On 5 September 2000, the Special Rapporteur sent an urgent appeal concerning the harassment of a lawyer, Dahlia Allen. Ms. Allen is representing 20 inmates of St. Catherine Adult Correctional Centre, in a commission of inquiry into their alleged mistreatment by prison guards. The information received stated that Ms. Allen has been subjected to surveillance and her telephone line tapped. Also it was alleged that threats had been made that claim that State Security officers associated with St. Catherine's prison are colluding with inmates to have Ms. Allen killed.

Observation

123. The Special Rapporteur is waiting for a response from the Government.

Kenya

Communication to the Government

124. On 21 September 2000, the Special Rapporteur sent a communication regarding threats made against the International Federation of Women Lawyers. The information received stated that on 29 August 2000, five police officers had tried to force their way into the association's office. Also, three staff members had received anonymous threats that they would be killed because of their work. It was alleged that the harassment was particularly linked to their provision of legal assistance to an alleged rape victim in bringing a case against a minister in the Office of the President.

Communications from the Government

125. On 18 February 2000, the Government replied to the Special Rapporteur's communication of 5 November 1999 concerning the trial of Tony Gachoka (see E/CN.4/2000/61, paras. 187-188). The Government denied that Mr. Gachoka's trial was unfair and stated that the court exercised its jurisdiction independently, without any interference from the executive or any other quarter.

126. On 26 October 2000, the Government replied to the Special Rapporteur's communication of 21 September 2000. The Government categorically denied being involved in any alleged intimidation. The incidents had been reported to the police and the matter was being investigated. The Government further stated that if any police officers are found to be involved, then they were acting in their personal capacities and will be prosecuted.

Observation

127. The Special Rapporteur thanks the Government for its responses. He is waiting to hear the outcome of the investigations in the case of the International Federation of Women Lawyers.

Kyrgyzstan

Communications to the Government

128. On 28 April 2000, the Special Rapporteur sent a communication concerning the situation of Ms. Nadejda Nikolaevna Maslovets. Ms. Maslovets is the only witness to a murder allegedly involving members of the Lenin District Internal Affairs Administration. Since the beginning of the trial of these persons she has been threatened with physical injury, offered bribes, and a car with black windows and no registration number has frequently been outside her house with two or three men inside. On 11 March 2000, she was attacked by the three men. She has reported these incidents to the prosecution department, but as at the date of the communication no action had been taken.

129. On 26 October 2000, the Special Rapporteur sent a follow-up communication to the Government noting that a response had not been received to the communication dated 28 April 2000.

130. The Special Rapporteur has received information on developments in this case from the Special Rapporteur on torture. The Office of the Public Prosecutor carried out an investigation into the threats, but it proved impossible to determine who was responsible. Ms. Maslovets was unable to identify anyone among staff members of the Lenin District Internal Affairs Administration as being her attacker. Ms. Maslovets also stated that she hadn't received any threats since 11 March 2000.

Observation

131. The Special Rapporteur has not heard anything further on this matter.

Lebanon

Communications to the Government

132. On 9 May 2000, the Special Rapporteur sent a joint urgent appeal with the Special Rapporteur on the promotion and protection of the freedom of opinion and expression concerning lawyer Muhamad Mugraby. On 5 May 2000, it was reported in a local newspaper

that the Prosecutor-General might prosecute Mr. Mugraby for defamation for his statements concerning corruption in the judiciary. It was also alleged that Mr. Mugraby might be subject to preventive detention. The Press Court, where Mr. Mugraby would be tried, does not have the power to order such arrests and furthermore under the code on the legal profession it is illegal to prosecute a lawyer before seeking authority from the Council of the Bar.

133. On 27 October 2000, the Special Rapporteur sent a follow-up communication to the Government noting that a response had not been received to the communications dated 25 June 1999 (E/CN.4/2000/61, para. 191) and 9 May 2000.

Communication from the Government

134. On 2 November 2000, the Government responded to the Special Rapporteur's communication of 27 October 2000. With respect to the communication dated 9 May 2000, the Government stated the Council of the Bar in Beirut had decided on 19 May 2000 that the actions of Mr. Mugraby did not emanate from the exercise of the functions of an advocate nor were they situated in that context. The case remains pending against Mr. Mugraby. With respect to the communication dated 25 June 1999, the Government stated that the persons responsible for the assassination of the judges had not been identified yet, but the investigations were continuing and the Government would inform the Special Rapporteur of any developments.

Observation

135. The Special Rapporteur will continue to monitor the two cases.

Malaysia

136. Former Deputy Prime Minister Anwar Ibrahim continues to be held in custody serving a total term of 15 years' imprisonment. His appeal on conviction and sentence in the first trial, when he was sentenced to six years' imprisonment on conviction of charges of corruption (not monetary, but for interfering with police investigations) is pending before the Federal Court after its dismissal by the Court of Appeal.

137. The appeal on his conviction and sentence of nine years' imprisonment on sodomy charges is pending before the Court of Appeal. On both cases he was refused bail, pending appeal.

138. Serious allegations regarding the unfairness of both trials have been made by his counsel and those who have observed or followed the trial both within and outside Malaysia.

139. In another related case lawyer Zainur Zakaria, a former President of the Malaysian Bar and one of Anwar Ibrahim's defence lawyers, was charged with contempt and sentenced to three months' imprisonment. His offence was that he filed an application on behalf of Anwar Ibrahim

to urge the court to disqualify two of the prosecutors. Zainur Zakaria was released on bail and his appeal to the Court of Appeal was dismissed. He has now appealed to the Federal Court. The appeal will be heard on 29 January 2001.

140. In yet another related case, on 4 January 2000, lawyer Karpal Singh, the lead lawyer in the second trial of Anwar Ibrahim, was charged with sedition for words he spoke in court on 10 September 1999 in the course of defending his client. His trial is now fixed for hearing on 18 May 2001. The Special Rapporteur sent a communication to the Government on this matter on 14 January 2000. The Government replied on 10 April 2000 stating that it could not substantively reply to the Special Rapporteur's concerns as the matter was before the courts and any comment would be pre-empting the decision of the court.

141. In another earlier case, lawyer Tommy Thomas, a former Secretary of the Bar Council, was charged with contempt of court over a press statement he made in connection with a settlement agreement earlier recorded in the same court. The day after the press statement was published he retracted the statement publicly, before he was cited for contempt. He was sentenced to six months' imprisonment. He was released on bail. His appeal was heard by the Court of Appeal and judgement has not been delivered.

142. In yet another development, the High Court granted an injunction at the behest of a lawyer to restrain the Malaysian Bar Council, the executive body of the 9,000-member Malaysian Bar, from convening an Extraordinary General Meeting to discuss improprieties in the Malaysian judiciary. The court held that the conduct of judges and the judiciary cannot be discussed save in parliament. The appeal from this judgement was dismissed by the Court of Appeal. Leave to appeal against that decision was refused by the Federal Court on 29 November 2000. Therefore, in Malaysia today the conduct of judges cannot be discussed by anyone, not even the legal profession, in a closed-door meeting, except in parliament.

143. These judgements on the conduct of judges were delivered at a time of controversy regarding allegations of misconduct by the Chief Justice of Malaysia, Tun Eusoff Chin, who retired from the bench on 19 December 2000. It was alleged that he had travelled to New Zealand on holiday with a lawyer in 1995 and subsequently sat on appeals where the particular lawyer appeared and obtained favourable judgements. The Chief Justice's public statement that he merely met the lawyer and his family by chance in New Zealand was refuted when private investigation reports showed that he and the lawyer, and their respective families, had travelled together and returned together.

Defamation suits against the Special Rapporteur

144. In his last report to the Commission on Human Rights (E/CN.4/2000/61, paras. 195-205), the Special Rapporteur drew the Commission's attention to the fact that the Malaysian High Court had dismissed his application to strike down one of the four defamation suits pending against him, despite the advisory opinion of the International Court of Justice (ICJ).

145. The Special Rapporteur appealed from the decision of the Registrar of the High Court to a judge of the High Court. The judge heard the appeal and delivered judgement on 7 July 2000. In his judgement the judge agreed that the Court was bound by the advisory opinion of the ICJ and therefore struck down the suit. However, with regard to costs the judge ordered that "each party ought to bear its own costs" and gave the following grounds for the order:

(a) That the Special Rapporteur made damaging and disparaging statements about the plaintiffs, their lawyer and the judiciary in most unpalatable terms;

(b) That the Special Rapporteur breached the basic law of failing to give the right to be heard to the plaintiffs or their lawyer or the judiciary;

(c) That the Special Rapporteur was incapable of holding an independent view on matters concerning the judiciary and lawyers in Malaysia and had shown total disregard for the word "impartial";

(d) That the Commission on Human Rights should have chosen a non-citizen to comment on the independence of the country's judges and lawyers;

(e) That the Special Rapporteur neither talked nor wrote to the plaintiffs or to the judiciary to seek their views.

146. The judge came to these conclusions without hearing any arguments from the counsel on costs. Further, he went into the merits of the case, which were not at issue before the court, and there was no evidence whatsoever before him for him to be able to make such a finding. These findings and the terms in which they were expressed clearly indicated that the judge was prejudiced, for reasons best known to himself.

147. In a press release from Geneva, the Centre for the Independence of Judges and Lawyers described that part of the judgement as "more partisan than judicial".

148. The Secretary-General of the United Nations, in a letter dated 24 July 2000 to the President of the Economic and Social Council, described those findings as "grounds that the United Nations finds unacceptable".

149. After consultations with legal counsel, the Special Rapporteur decided not to appeal that part of the judgement.

150. Three more suits are still pending before the courts and have not been disposed of.

151. Four international legal associations, namely the International Bar Association, the International Commission of Jurists, the Commonwealth Lawyers' Association and the Union internationale des advocats, after a joint mission to Malaysia in April 1999 issued a joint report called "Justice in Jeopardy: Malaysia 2000". The mission concluded that the concerns expressed regarding the independence of the judiciary over the last 13 years were well founded.

152. A positive development was the appointment of the new Chief Justice, Tan Sri Mohamad Dzaiddin Abdullah, a former Vice-President of the Malaysian Bar and judge of the Federal Court, which was enthusiastically welcomed by all, including the Malaysian Bar and the media. The new Chief Justice has pledged to restore public confidence in the judiciary and has taken certain measures to that end.

153. On 1 January 2001 a new Attorney-General was also appointed. Dato' Ainum Mohd Saaid is the first woman in Malaysia to be appointed to this high office. Her appointment was welcomed by all quarters.

Mexico

Communications to the Government

154. On 9 May 2000, the Special Rapporteur sent a communication to the Government concerning the situation of lawyer Juan de Dios Hernández Monge. Mr. Hernández represents a group of students from the National Autonomous University of Mexico who are currently in detention. On 3 May 2000, he was attacked by a man whilst in his car at a set of traffic lights. The man asked whether he was the lawyer for the above-mentioned students, then insulted him and cut his forehead. Previously, on 2 January 2000, Mr. Hernández was beaten by unknown men in the parking lot of the National Autonomous University. It was alleged that despite the incident having been reported to the police, no investigation has taken place.

155. On 5 June 2000, the Special Rapporteur sent a communication concerning lawyers Leonel Guadalupe Rivero Rodríguez, Maurilio Santiago Reyes and María del Pilar Marroquín. On 29 March 2000, Mr. Rivero Rodríguez's house was burgled in an apparent attempt to steal files relating to his defence of students of the National Autonomous University of Mexico. On 12 May 2000, several rocks were thrown through the windows of his house. On 9 May 2000, Mr. Santiago Reyes and Ms. Marroquín were subjected to acts of intimidation: a van without number plates drove repeatedly past Mr. Santiago Reyes' house and that night they received several phone calls threatening to "go for your head".

156. On 26 October 2000, the Special Rapporteur sent a follow-up communication to the Government noting that a response had not been received to the communication dated 5 June 2000.

Communications from the Government

157. On 26 May 2000, the Government supplied additional information concerning Digna Ochoa y Plácido and the Miguel Agustín Pro-Juarez Human Rights Centre. The Government stated that the Office of the Procurator-General of the Federal District was conducting an investigation into the alleged threats to the Centre. On 5 November 1999, the Centre was placed under special surveillance by the Judicial Police of the Federal District and an offer was made to Ms. Ochoa to provide for her personal safety, which she accepted on 18 November 1999. She is currently being protected by three female Judicial Police officers. On 4 November 1999, an order was made to the Judicial Police to provide 24-hour protection to the Centre.

158. On 16 July 2000, the Government sent a response to the communication concerning Juan de Dios Hernández Monge. The Government stated that the Office of the Attorney-General for the Federal District had initiated an inquiry jointly with the branch office of the public prosecutors office in Coyocán. On 1 March 2000, a proposal was made not to initiate criminal proceedings, as the complainant had not appeared despite having been summoned. Further, the National Human Rights Commission received a letter of complaint on 6 January 2000, but considered that the factual elements, which did not suggest that any federal authority was involved, did not permit it to intervene in this case. It was therefore the responsibility of the public prosecutor to investigate the matter.

159. On 1 November 2000, the Government sent a response to the communication concerning Leonel Guadalupe Rivero Rodríguez and Maurilio Santiago Reyes and Milar del Pilar Marroquín. The Government stated that the Office of the State Procurator-General had initiated a preliminary investigation which was currently being completed. Also, the Oaxaca Procurator-General reported that the lawyers concerned stated, on 10 July 2000, that they did not wish to be seen by the psychology expert from the Procurator's Office, which is a requirement for the completion of a preliminary investigation concerning the offence of threatening behaviour. They also stated that they did not wish to provide additional information for the investigation.

Observation

160. The Special Rapporteur thanks the Government for its responses.

Myanmar

161. The Special Rapporteur has taken note of the report of the Special Rapporteur on the Commission of Human Rights on the situation of human rights in Myanmar (A/55/359, paras. 27-29). The report stated that "the administration of justice is greatly marked by legal and factual constraints that are inconsistent with judicial independence. Not only are the courts not independent but they are also powerless in protecting the rights of victims in violations of their basic rights". The report also noted that there was a lack of information on whether the system of the administration of justice had changed or as to whether repressive laws from the former colonial regime were no longer being applied in a manner that violated fundamental human rights.

Observation

162. The Special Rapporteur will continue to monitor the situation.

Nepal

Communication to the Government

163. On 3 October 2000, the Special Rapporteur sent a communication concerning certain police activities that undermine the independence of the judiciary. The allegation stated that in

several cases the police had ignored judicial decisions requiring the release of prisoners illegally held in custody. In one case concerning Mr. Tara Bhusal, the police entered the court building to rearrest Mr. Bhusal several hours after a court decision had ordered him to be released from custody. In another case, Mr. Nar Bahadur Ale has been rearrested eight times in defiance of court orders releasing him from detention.

Communication from the Government

164. On 9 October 2000, the Government acknowledged receipt of the Special Rapporteur's communication of 3 October 2000. The Government further stated Mr. Tara Prasad Bhusal is not under police detention, and is currently in his village.

Observation

165. The Special Rapporteur is waiting for a response from the Government.

Pakistan

Communications to the Government

166. On 14 March 2000, the Special Rapporteur sent a communication concerning lawyer Iqbal Raad. On 10 March 2000, four gunmen killed Mr. Raad, a defence lawyer of former Prime Minister Nawaz Sharif, and three others in Mr. Raad's Karachi office. As a result Mr. Sharif's other defence lawyers have decided not to appear in court because of concern that an attempt would be made on their lives.

167. On 28 April 2000, the Special Rapporteur sent a communication concerning the situation of Judge Malik Qayyum. It was alleged that the military regime is considering promoting Judge Qayyum to the position of Chief Justice of the Lahore High Court, despite his lack of appropriate qualifications.

168. On 28 April 2000, the Special Rapporteur sent a communication concerning the situation of Dr. Farooq Sattar, a former Mayor of Karachi. On 26 November 2000, Dr. Sattar was arrested and taken to a military base in Karachi. On 7 February 2000 he was brought before the Public Accountability Court in Karachi, but not informed of the charges against him and on 23 February 2000, Dr. Sattar was transferred to Attock Fort. It is alleged that at Attock Fort there is no lawyer-client confidentiality as all conversations between lawyers and their clients are recorded.

169. On 26 October 2000, the Special Rapporteur sent a follow-up communication to the Government noting that a response had not been received to the communications dated 22 February 1999 (E/CN.4/2000/61, para. 219), 21 May 1999 (E/CN.4/2000/61, para. 221), 14 March 2000, and two communications dated 28 April 2000.

Observations

170. The Special Rapporteur wishes to express his concern over the continued failure of the Government to respond to his communications. The Special Rapporteur continues to receive complaints over the Senator Asif Ali Zaidari case.

Palestine

Communication to the Government

171. On 11 February 2000, the Special Rapporteur sent a communication concerning the situation of some judges and members of the prosecution in the West Bank who have declared a strike. The strike was declared as the result of a mob of people storming the Court of First Instance in Bethlehem on 6 February 2000. The mob locked the judges and the prosecutor inside the court building and demanded that a 15-year sentence imposed on Ibrahim and Nidal Obeyad be withdrawn. It was alleged that some members of the mob were dressed in military clothing.

172. On 17 May 2000, the Special Rapporteur sent a communication concerning the Palestinian Bar Association. On 10 May 2000, the Acting Council of the Palestinian Bar Association notified 31 lawyers that they were being transferred from the list of practising lawyers to the list of non-practising lawyers, depriving them of the right to appear before Palestinian courts. Many of the lawyers removed were from human rights organizations. This decision was taken on the last day before the expiry of the term of the Acting Council, which had been appointed by President Arafat three years previously.

173. On 19 May 2000, the Special Rapporteur sent a communication concerning the situation of lawyer Khader Shkirat who is the Director of the Palestinian Society for the Protection of Human Rights and the Environment (LAW). It was alleged that Brigadier General Tawfeeq Al Tirawi, Chief of General Intelligence in the Northern Districts, had asked the Deputy Head of the Bar to dismiss Mr. Shkirat. The Deputy Head rejected the request and advised Brigadier General Al Tirwai to lodge a formal complaint with the Bar. It was further alleged that in response to a statement by Mr. Shkirat on 27 April 2000 that the weakness of the Bar could be due to the fact that many of its members work for the security forces, the Deputy Head publicly threatened to kill Mr. Shkirat. On 7 May 2000, the Al Hayat Al Jadida newspaper published a statement by the Head of the Bar Association to the effect that a director of an NGO should not be permitted to be a member of the Bar.

174. On 26 October 2000, the Special Rapporteur sent a follow-up communication to the Government noting that a response had not been received to the communication dated 11 February 2000.

Communications from the Government

175. On 2 June 2000, the Government acknowledged receipt of the Special Rapporteur's communication of 19 May 2000.

176. On 5 June 2000, the Government referred to its letter of 2 June 2000, and the Special Rapporteur's of 17 May 2000, and stated that the Palestinian Authority has nothing to do with the circumstances contained in those communications. The party involved is the Bar Association, in whose internal affairs the Palestinian Authority cannot interfere.

Observation

177. The Special Rapporteur is awaiting a response to his communication of 11 February 2000.

Panama

Communication to the Government

178. On 22 August 2000, the Special Rapporteur sent a communication regarding the situation of a former Justice of the Supreme Court, Mr. Oscar Ceville. Mr. Ceville had been appointed to the Fifth Chamber of the Supreme Court for a period of 10 years. In October 1999, legislation was passed abolishing the Fifth Chamber, and Mr. Ceville lost his judicial office. In November 1999, a petition was lodged challenging the abolishment of the Fifth Chamber of the Supreme Court, but as at the date of the communication, it was alleged that the court had not acted upon the case file.

Communications from the Government

179. On 8 September 2000, the Government replied to the communication concerning Oscar Ceville. The Government informed the Special Rapporteur that the Supreme Court of Justice is currently dealing with or has delivered its verdict in six cases concerning the abolition of the Fifth Chamber of the Supreme Court of Justice. With respect to the petition lodged on 2 November 1999, initially Judge Edgardo Molina Mola was appointed reporting judge, but he declared himself incompetent to assume jurisdiction over the case on 11 November 2000. On 22 November 2000, the Plenary Court ruled this declaration illegal, but Judge Molina Mola took no action in this case and his jurisdiction lapsed on 31 December 1999. He was replaced by Judge Arnulfo Arjona who likewise declared himself incompetent to assume jurisdiction, which was similarly rejected by the Plenary Court on 21 January 2000.

180. On 11 February 2000, the case was declared admissible and the court requested the Procurator-General to provide an opinion, which was provided on 31 March 2000. Counsel was also permitted to submit written argument. On 30 June 2000, the case was referred to the reporting judge to draft a judgement for submission to the Plenary Court. Two other challenges to the constitutionality of Law No. 49 of 24 October 1999, which abolished the Fifth Chamber of the Supreme Court, were lodged on 18 June and 28 June 2000.

181. On 24 October 1999, the Fifth Chamber of the Supreme Court ruled an amparo proceeding brought by Judges Elitza Cedeño, Mariblanca Staff and Oscar Ceville admissible. The Legislative Assembly lodged an application for clarification and amendment of this decision on 28 October 1999. On 25 February 2000, the Plenary Court ruled this application inadmissible and ordered the proceedings to be referred back to the Secretariat of the Supreme Court.

The Court further stated that the grounds of nullity contained in article 722.1 of the Judicial Code, referring to the transfer of jurisdiction, are fulfilled in this case "because the power to exercise jurisdiction over amparo and habeas corpus proceedings conferred on the Fifth Division was reassigned to the Plenary Court, by means of Law No. 49 of 24 October 1999". Pursuant to this the case file is held by Judge Aguilera de Franceschi, after which normal proceedings will continue in due course.

Observation

182. The Special Rapporteur thanks the Government for its response. The abolition of the Fifth Chamber, with its judges not reassigned to another court or given adequate compensation, must be seen as an indirect way of removing judges arbitrarily without due process.

Peru

Communications from the Government

183. On 1 March 2000, the Government responded to the Special Rapporteur's communication of 28 June 1999 (E/CN.4/2000/61, paras. 235-236) concerning Judge Antonia Saquicuray Sanchez (see E/CN.4/2000/61, paras. 235-236). The Government stated that Judge Saquicuray was appointed to the District Judiciary Inspection Commission (ODICMA), in accordance with article 2 of Administrative Decision No. 197-96-SE-TP-CME-PF of 24 May 1996. This provision stipulates that Presidents of the High Courts of Justice, as part of their inspection functions, shall be responsible for appointing judges to the District Judiciary Inspection Commission, on informing the Judiciary Inspection Office. Judge Saquicuray assumed the new post on 14 May 1999, without administrative challenge and will return to the court on completion of her duties.

Observations

184. The Special Rapporteur thanks the Government for its response but notes that it has not responded to the allegations of an improper motive in the transfer.

Senegal

Communication to the Government

185. On 28 July 2000, the Special Rapporteur sent a joint intervention with the Special Rapporteur on torture concerning the trial of Hissène Habré. On 30 June 2000, the Superior Council of the Magistracy was convened, presided over by President Wade and the Minister of Justice. The Council decided to transfer Judge Demba Kandji, the judge responsible for the indictment of Mr. Habré, from his position as Chief Investigating Judge of the Dakar Regional Court to become the Assistant State Prosecutor at the Dakar Court of Appeals. The Council also promoted Cheikh Tidiane Diakhaté, President of the Indicting Chamber, before whom a motion to dismiss the charges against Mr. Habré was sub judice, to the State Council. On 4 July 2000, all charges of torture were dismissed against Mr. Habré. Also, since 12 April 2000,

Madické Niang, Mr. Habré's principal lawyer, had been acting as President Wade's Special Adviser on judicial matters. In view of the seriousness of the matter, the Special Rapporteur issued a press release with the Special Rapporteur on torture expressing their concerns.

Communications from the Government

186. On 9 November 2000, the Special Rapporteur received a reply to his communication. The Government stated that the Indicting Chamber had dismissed the charges against Hisséne Habré without any pressure from the Government, solely on the basis of legal principles in force in Senegal, in particular the principle of territorial jurisdiction. In this connection, the Government recalled that the charges against Mr. Habré related to acts committed outside Senegal. Further, the charges were based exclusively on international law which has no basis in national law. Moreover, the Government stated that the application of the Convention is not automatic, since article 79 of the Constitution acknowledges the superiority of treaties on condition of reciprocal application by other parties to the treaty, evidence of which would be uncertain in the present case. A cassation appeal is available against the judgement.

187. With regard to the concerns expressed, the Government explains that Mr. Diakhaté, who delivered the judgement, was not sitting as a single judge, but that it was the Chamber as a whole that declared the Court had no jurisdiction. His promotion can thus not be seen as a reward for this judgement. Further, the promotion of Mr. Kandji cannot be seen as punishment for the lawful and careful decision of having indicted Mr. Habré. The Government indicates that both promotions should be seen in the light of the seniority and experience of Mr. Diakhaté and Mr. Kandji. With regard to the appointment of Mr. Madicke Niang as the President's Special Adviser, the Government denies any connection with the case against Mr. Habré.

188. As to the independence of the judiciary in general, the Government notes that the judicial power is organized according to the Basic Law, which establishes the security of tenure of judges. All judicial appointments are made upon proposal by the Minister of Justice, after advice from the Superior Council of the Magistracy. This procedure was followed in the present case. The Government observes that no judge can refuse to be transferred to another judicial post on the basis of personal interest, the exigencies of service taking priority. In case a judge challenges an appointment, a judicial remedy is available for abuse of power.

Observation

189. The Special Rapporteur thanks the Government for its response. The timing of the transfer of Judge Demba Kandji gave the appearance of executive interference.

Slovakia

Communications to the Government

190. On 28 September 2000, the Special Rapporteur sent an urgent appeal concerning the situation of Dr. Stefan Harabin. It was alleged that a proposal, approved by the Minister of Justice, had been submitted to the National Council of the Slovak Republic for the removal of

Dr. Harabin. This was stated to be contrary to the Constitution, as none of the grounds for the removal of a judge from office were met in Dr. Harabin's case, and his five-year term had not yet expired.

191. On 13 October 2000, the Special Rapporteur sent a follow-up urgent appeal concerning Dr. Stefan Harabin. The Special Rapporteur stated his view that appointments to the position of Vice-President or President of a court constitute a promotion and judges in these positions should be subject to removal only on the grounds contained in the Constitution, otherwise their fixed term of appointment would be meaningless.

192. On 1 November 2000, the Special Rapporteur sent a communication requesting, in light of the Government's communication of 23 October 2000 and his continuing concerns about the situation, permission to conduct an in situ mission in the week commencing 20 November 2000.

Communications from the Government

193. On 23 October 2000, the Government responded to the Special Rapporteur's urgent appeals dated 28 September and 13 October 2000. According to the Slovak Constitution and Act No. 335/1991 on Courts and Judges, the President and Vice President of the Supreme Court shall be elected for a period of five years, based on the proposal of the Government, and can be recalled from those positions. The recall from such a position does not, however, result in loss of the position as judge of the respective court. The Council of Judges of the Supreme Court and the Council of Judges of the Slovak Republic issue opinions on proposed judicial appointments that have only an advisory character.

194. The Government stated that when Dr. Harabin was elected President of the Supreme Court in February 1998, both the Council and the Association of Judges expressed a negative opinion on his appointment. The Government also cited other incidents as calling into question Dr. Harabin's credibility and providing a basis for removal. Dr. Harabin did not participate in Ministry of Justice initiatives to eliminate corruption from the justice system and expressed negative views on the measures adopted. In 1999, Dr. Harabin refused to fill in a statement concerning his personal finances, claiming the request had no legal basis. In a letter to the head of the unit in charge of Slovakia's application for EU membership dated 16 June 2000, Dr. Harabin claimed that, in the opinion of the Supreme Court, the Council of Judges of the Supreme Court and many other judges, the proposed amendments to the Slovak Republic Constitution are not consistent with the separation of powers. The Government stated that the Council of Judges of the Slovak Republic and the Association of Judges of the Slovak Republic support the proposed amendments. The Government further cites the decision of the Constitutional Court No. II-US 17/00 of 15 March 2000, which declared the removal of the Vice-Chairman of the Supreme Court by the Government to be constitutional.

195. On 6 November 2000, the Government acknowledged receipt of the request for a mission and informed the Special Rapporteur that the request had been sent to the appropriate authorities. The mission of the Special Rapporteur took place from 27 to 30 November 2000.

Observations

196. For further reference please see the report of the mission to the Slovak Republic (E/CN.4/2001/65/Add.3).

South Africa

197. Since the conclusion of the mission to South Africa the Special Rapporteur has received information that the policy unit of the Ministry of Justice has produced a draft Legal Practice Bill. This has been described by the Minister of Justice as a "draft working document", for discussion purposes only. The present draft is in fact the third draft.

198. Controversy has arisen over the composition of the statutory council, headed by a judge, that will effectively assume the power and functions of the four provincial law societies that exist to represent attorneys, the Law Society of South Africa, as well as the General Council of the Bar which represents advocates. Of concern to the lawyers is that this proposed statutory council will be composed of persons the majority of whom are not from the ranks of the legal profession and is viewed as a threat to an independent legal profession.

199. The Government is reported to have justified such a composition on the basis of comparative legislation which establishes councils in the health, accounting, engineering, architecture, estate agency and quantity surveying professions and which have a similar composition.

200. The Special Rapporteur has written directly to the Minister of Justice expressing his concerns and has clarified why the legal profession in a democratic society is different from the other professions.

201. The Special Rapporteur will continue to monitor developments.

Spain

Communications to the Government

202. On 13 October 2000, the Special Rapporteur sent a communication concerning the murder of the Chief Prosecutor of the Andalucia Regional Court, Mr. Luis Portero. On 9 October 2000, Mr. Portero was murdered outside his house in Granada, allegedly by the Basque separatist group Euzkadi Ta Askatasuna (ETA).

203. On 11 November 2000, the Special Rapporteur sent a communication concerning the murder of Supreme Court Justice José Francisco Querol, also allegedly by ETA. The Special Rapporteur noted that although he is aware that the Government is concerned about these developments, it is necessary that the Government take appropriate steps to ensure that members of the judiciary, prosecutors and lawyers are provided with adequate security.

Communication from the Government

204. On 8 December 2000, the Government responded to the Special Rapporteur's communication of 13 October 2000. The Government stated that it provides proper protection to prosecutors and judges as it does to all citizens. In relation to the murder of Dr. Luis Portero, the State security forces had detained those thought to be responsible for the murder, who are waiting to be tried.

Observation

205. The Special Rapporteur thanks the Government for its response.

Sri Lanka

Communications to the Government

206. On 17 January 2000, the Special Rapporteur sent a communication concerning the murder of lawyer Kumar Ponnambalam. Mr. Ponnambalam, a prominent lawyer who represented many clients in human rights cases, was shot five times on 5 January 2000. It was alleged that he was assassinated because of his effective defence of his clients.

207. On 11 August 2000, the Special Rapporteur sent a follow-up letter regarding the murder of lawyer Kumar Ponnambalam.

208. In his report to the Commission (E/CN.4/2000/61, paras. 251 and 259) the Special Rapporteur referred to the controversy over the appointment of the Chief Justice, who had been the former Attorney-General. The Special Rapporteur also referred to two petitions before the Supreme Court to strike the Attorney-General off the roll of advocates for misconduct. The Special Rapporteur has been informed that the petitions have not been heard. Preliminary objections on the composition of the Supreme Court to hear the petitions have been heard but no judgement has been delivered.

Communication from the Government

209. On 18 August 2000, the Government responded to the Special Rapporteur's communication of 11 August 2000. The Government informed the Special Rapporteur that the assassination of Mr. Ponnambalam was under judicial investigation and that further details would be communicated once judicial investigations were completed.

Observations

210. The Special Rapporteur expresses concern over the delay in investigations into the murder of Kumar Ponnambalam and calls upon the Government to expedite and apprehend the perpetrators of this brutal murder.

211. In his sixth report to the Commission on Human Rights (E/CN.4/2000/61, para. 252) the Special Rapporteur referred to the urgent appeal he sent to the Government concerning the criminal prosecution of Dr. Jayalath Jayawardena, a member of Parliament. In an addendum to the same report (E/CN.4/2000/61/Add.2) the Special Rapporteur referred to the Government's communication in response.

212. The Special Rapporteur is pleased to report that Dr. Jayawardena was acquitted of the charges in the first prosecution. The second prosecution, on similar charges, has not been withdrawn. That prosecution has been fixed for trial on 26 February 2001.

United Kingdom of Great Britain and Northern Ireland

213. The Special Rapporteur continues to monitor closely the investigations into the appalling murders of Rosemary Nelson and Patrick Finucane and the continuing harassment of defence lawyers in Northern Ireland.

214. During the fifty-sixth session of the Commission on Human Rights the United Kingdom Government stated that it would not respond during the Commission to the concerns contained in the Special Rapporteur's general report (E/CN.4/2000/61, paras. 303-322); rather, it would respond directly to the Special Rapporteur at a later date. The Special Rapporteur regrets that as at the date of the writing of this report, he had not received a response.

Murder of Patrick Finucane

215. The investigation by Sir John Stevens, Commissioner of the Metropolian Police, continued during the year without reaching a final conclusion. William Stobie, who was charged with the murder of Patrick Finucane in June 1999, is now expected to stand trial, only for aiding and abetting in the murder, later in 2001. In this respect, the Special Rapporteur wishes to refer to the concerns raised in his report to the fifty-sixth session of the Commission on Human Rights (E/CN.4/2000/61, paras. 315 and 316). No further arrests were made during the year for the murder, although there were reports of charges being laid for connected incidents of "possession of information useful to terrorists".

216. On 1 March 2000, the Special Rapporteur received a communication from the Stevens Investigation office stating that Deputy Assistant Commissioner Hugh Orde had taken over the day-to-day responsibility for the investigation. The Special Rapporteur met with the Deputy Assistant Commissioner in Geneva on 9 June 2000, when matters concerning the status of the investigations were discussed. The Special Rapporteur requested that the reports of the previous investigations carried out by Sir John Stevens be released to him.

217. On 14 June 2000, the Deputy Assistant Commissioner indicated in a letter that the Chief Constable of the Royal Ulster Constabulary (RUC) did not think it would be appropriate to release the Stevens reports, both I and II, to the Special Rapporteur.

218. On 5 October 2000, the Special Rapporteur again met the Deputy Assistant Commissioner in Belfast where the status of the investigations were discussed. In a communication on 6 October 2000, Mr. Orde clarified the fact that the "Stevens III" investigation is the first and only time that Sir John Stevens had been requested by the Chief Constable of the RUC to investigate the murder of Patrick Finucane. While the murder of Mr. Finucane would have featured in the previous investigations, "the clear and absolute responsibility" lay with the RUC until 19 April 1999.

219. On 11 September 2000, the Special Rapporteur sent a letter to Prime Minister, Tony Blair following the Prime Minister's meeting with the Finucane family and the representatives of British Irish Rights Watch and the Committee on the Administration of Justice. The Special Rapporteur expressed his concern over the murder of Patrick Finucane and reiterated his call for an independent public inquiry. The Special Rapporteur stated that "from the information and facts I have gathered there is reason to believe that at the material time the relevant authorities in Northern Ireland knew or ought to have known that Patrick Finucane's life was threatened". Further, the allegations of possible collusion between military intelligence and the RUC cannot be dealt with fully by the current police investigation. This form of investigation can only investigate criminal offences and therefore will not result in recommendations to prevent such malpractice in the future; this can only be achieved by a public inquiry. To date the Special Rapporteur has not received a response from the Prime Minister.

Murder of Rosemary Nelson

220. The investigation into the murder of Rosemary Nelson also continued this year without reaching a final conclusion. The investigation has continued for two years and cost an estimated £3 million. The Special Rapporteur has had meetings with Mr. Colin Port who is leading the investigations into the murder. Though considerable progress is said to have been made towards identifying the perpetrators, it remains to be seen whether sufficient evidence will be available for a successful prosecution. The Special Rapporteur is also concerned about possible leaks from the investigation that may be undermining the integrity and efficacy of the investigation.

221. The Special Rapporteur is particularly concerned about the continuing failure of the Chief Constable of the RUC to respond in writing to questions asked by various NGOs regarding the steps taken to investigate the threats made against Rosemary Nelson before her death. The Special Rapporteur has been informed that the Committee on the Administration of Justice has lodged a confidential complaint with the Police Ombudsman for Northern Ireland regarding the alleged failure of the Chief Constable of the RUC to properly investigate the threats made against Rosemary Nelson prior to her murder.

Harassment of defence lawyers

222. On 19 July 2000, the Special Rapporteur sent a communication regarding the safety of lawyer Padraigin Drinan. According to the information received, members of the RUC in Lurgan had threatened to charge Ms. Drinan with obstruction in the context of the professional advice she provided to her clients. Further, although Ms. Drinan had been accepted under the

Key Persons Protection Scheme as a person at risk of being subjected to violence, sufficient security measures were not in place. At that time, during "marching season", the implementation of security measures had only been partially completed and others were not going to be completed until the end of the year.

223. On 15 November 2000, the Government responded to the Special Rapporteur's communications of 19 July and 26 October 2000. The Government stated that after initial difficulties in arranging an appointment to conduct a site meeting to discuss necessary security measures, an appointment was made on 21 April 2000. After this meeting, and after a determination of costs was made, the work was approved on 25 May 2000. Construction Services contacted Ms Drinan but were informed that she was unavailable until 20 June 2000. On that date Ms. Drinan was informed that some security measures would be installed before the contractors' July holidays, but others could not. Ms. Drinan expressed concern and was advised to contact the Police Division to arrange interim protection measures. Ms. Drinan denies being advised of the delays.

224. On 28 June 2000, Ms. Drinan expressed concern to the Police Division that the work had not commenced. The work commenced on 29 June 2000. Also on 29 June 2000, Ms. Drinan was informed that a new front door could be installed on 5 July 2000, and was offered interim protection measures. Ms. Drinan refused these stating that 5 July was too late as the Drumcree march would have started by then.

225. The Government also informed the Special Rapporteur that police investigations into two incidents involving Ms. Drinan were being supervised by the Independent Commission for Police Complaints. The investigations concern an incident that took place between Ms. Drinan and RUC officers at Lurgan Station on 1 July 2000 and a second incident on 24 July 2000 when Ms. Drinan's car was forced off the road by an unmarked vehicle in the Lurgan area.

226. The Police Ombudsman for Northern Ireland, Ms. Nuala O'Loan, indicated in a letter dated 10 November 2000 that she was conducting a review of these matters.

Review of the criminal justice system in Northern Ireland

227. In March 2000, the Review of the Criminal Justice System in Northern Ireland was completed and its report published. The Special Rapporteur would like to note chapter 3, paragraph 53 of that report which states, inter alia, "We agree with the Special Rapporteur on the Independence of Judges and Lawyers that government has a responsibility to provide the machinery for an effective and independent investigation of all threats made against lawyers and note the role of the Police Ombudsman if such allegations relate to the actions of police officers. Further, we endorse his recommendation that training seminars should be organized to enable police officers and members of other criminal justice agencies to appreciate the important role that defence lawyers play in the administration of justice and the nature of their relationship with their clients."

Observations

228. The Special Rapporteur reiterates his earlier calls for a judicial commission of inquiry into the Patrick Finucane murder. It is now nearly two years since the murder of Rosemary Nelson. Though some progress is said to have been made, the delay in concluding the investigations is a source of concern. In order to avoid any allegation of impunity being levelled against the Government over these murders, it is in its interest to set up a judicial commission of inquiry into both murders. The Government of the United Kingdom of Great Britain and Northern Ireland must be seen as a role model for accountability and transparency in the administration of justice.

229. The Special Rapporteur urges the newly appointed Police Ombudsman to review all complaints by defence lawyers against RUC officers.

United States of America

Communications to the Government

230. On 3 February 2000, the Special Rapporteur sent a communication regarding the case of Ms. Betty Lou Beets. Ms. Beets was sentenced to death in 1985 for the murder of her husband after a trial in which crucial mitigating evidence was never presented to the jury, including her history of severe physical and sexual abuse. On appeal in the Federal Court, evidence was presented that showed that Ms. Beets' trial attorney was guilty of grossly unethical behaviour and conflict of interest which had contributed to her death sentence. The trial attorney held crucial information that disproved the prosecution's allegation that Ms. Beets killed her husband for remuneration. He refused to withdraw from the case and instead signed an agreement with Ms. Beets providing him with all media rights to her story as his fee for representing her at trial. In 1991 a federal district judge ruled that the trial attorney's behaviour breached Ms. Beets' right to adequate counsel; this was reversed by the 5th Circuit Court of Appeals.

231. On 21 August 2000, the Special Rapporteur sent an urgent appeal regarding the imminent execution of Alexander Edmund Williams. The information received highlighted the ineffective and incompetent performance of Mr. Williams' state-appointed attorney during the sentencing phase of his trial. The attorney failed to investigate his client's background or interview family members and so failed to discover the history of mental and physical abuse that Mr. Williams had suffered as a child. The Special Rapporteur drew attention to the fact that this was not the first case that had been brought to his attention where the incompetence of a state-appointed attorney seemed to have lead to the imposition of the death penalty. Due to the seriousness and urgency of the matter the Special Rapporteur issued a press release expressing his concerns.

Communications from the Government

232. On 25 February 2000, the Government responded to the communication concerning Ms. Betty Lou Beets. The Government stated that issues concerning the unethical behaviour of Ms. Beets' trial attorney had been argued extensively at in all levels of the proceedings, at both

the state and federal levels. The United States Fifth Circuit Court of Appeals concluded that whilst the actions of Ms. Beets' trial attorney may have been unethical, they did not amount to a constitutional violation. The Court further stated that Ms. Beets and two other witnesses presented evidence at trial, which indicated that Ms. Beets did not know about her husband's insurance. Therefore, her attorney's failure to withdraw was not in any way prejudicial. The Fifth Circuit Court of Appeals further held that there was sufficient additional evidence to convict her of murder for remuneration.

233. On 29 August 2000, the Government responded to the communication concerning the trial of Alexander Edmund Williams. The Government stated that five courts, state and federal, had rejected the argument that the ineffective assistance provided by Mr. Williams' trial attorney resulted in the imposition of a capital sentence. The Government also informed the Special Rapporteur that the Georgia Supreme Court indefinitely stayed Mr. Williams' execution on 22 August 2000.

Observation

234. The Special Rapporteur thanks the Government for its prompt response. The order of the Supreme Court of Georgia to stay the execution in the Williams case is most welcome. The Special Rapporteur continues to be concerned over the spate of convictions and death sentences alleged to be due to the incompetence of defence counsel.

Yemen

Communication to the Government

235. On 26 October 2000, the Special Rapporteur sent a follow-up communication to the Government noting that a response had not been received to the communication dated 11 January 1999 (E/CN.4/2000/61, para. 323).

Communication from the Government

236. On 20 November 2000, the Government responded to the Special Rapporteur's communication of 26 October 2000. The Government stated that the trial of Abdul Hassan al-Mehdar and his associates was carried out in accordance with Yemeni law, in public; the accused were given free contact with their lawyers during detention and were represented by lawyers at trial. In the case concerning some persons, including British citizens, who were allegedly involved in planning bomb attacks in Aden, the accused had the right to contact their lawyers and were represented in court. The court addressed the allegations of torture, declaring that they were unsubstantiated on the basis of testimony of a medical examiner.

Observations

237. The Special Rapporteur thanks the Government for its response.

Yugoslavia

Communications to the Government

238. On 3 May 2000, the Special Rapporteur sent a communication regarding a lawyer, Husnija Bitic. On 17 March 2000, four masked men entered the Belgrade apartment of Mr. Bitic and threatened and seriously injured Mr. Bitic and his wife. It was alleged that Mr. Bitic was targeted because of his representation of Kosovar Albanian prisoners currently held in detention in Serbia.

239. On 26 October 2000, the Special Rapporteur sent a follow-up communication to the Government noting that a response had not been received to the communications dated 2 November 1999 (E/CN.4/2000/61, para. 325) and 3 May 2000.

240. The Special Rapporteur has taken note of the report to the General Assembly (A/55/282) of the Special Rapporteur of the Commission on Human Rights on the situation of human rights in Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia. It was reported that federal and republican authorities continue to use the judicial and legal systems to legitimize political repression and criminalize opposition activity, civil society and the expression of dissent. In connection with mass arrests that took place earlier in the year, nine lawyers were being prosecuted before Serbian courts. On 12 July 2000, the Serbian parliament relieved 13 court officials, mostly judges, of their duties. These judges were noted for their independence.

241. The report also noted that the United Nations Interim Mission in Kosovo (UNMIK) had only been able to hire 5 out of the 12 judges, and 2 out of the 5 prosecutors required. The report considered that the filling of these positions should be pursued on an urgent basis and that UNMIK should consider the appointment of highly qualified international lawyers to fill the positions.

Observation

242. The Special Rapporteur expresses concern over the failure of the Government to respond to his communications.

Zimbabwe

243. The Special Rapporteur views with grave concern the attacks on the judiciary in Zimbabwe, in particular the Supreme Court and its judges, arising from recent judgements of the Court with respect to the Governments seizure of land owned by white farmers without the paying of compensation. Statements in the media attributed to high-ranking government officials, including ministers, about the Supreme Court, and particularly its white judges, are seen as threats to the independence of the judiciary.

244. The Special Rapporteur has communicated his concerns to the Government and will, as agreed with the Government, undertake a mission to Zimbabwe as soon as possible.

VIII. CONCLUSIONS AND RECOMMENDATIONS

A. Conclusions

245. This mandate is very research intensive. Both structuring an in situ mission and evaluating the information gathered during and after the mission require skilled human resources. As will be seen from some of the country situation reports, follow-up on communications from the Governments has been dismal. This again is due to insufficient human resources at the Office of the High Commissioner for Human Rights.

246. Some complaints need urgent and prompt intervention to prevent damage rather than intervention after damage. The urgent intervention in Slovakia was undertaken on this premise and it was found to be effective. Again, for such speedy interventions and constant monitoring, human resources, in addition to financial resources, are imperative.

247. The Special Rapporteur intends to undertake three missions this year, to Mexico, Saudi Arabia and Zimbabwe. These are missions that the respective Governments agreed to and confirmed at the fifty-sixth session of the Commission on Human Rights.

248. Judicial accountability is becoming an issue of importance in several countries, often leading to tension between the Government and the judiciary. This tension between judicial independence and judicial accountability needs to be addressed to provide certain parameters so that judicial independence is not undermined. Standards may need to be formulated to guide a sound system for accountability. Resources permitting, the Special Rapporteur intends to address this issue in the next two years with the assistance of some experts.

249. From the country situation reports it will be noted that some Governments are slow in their responses to communications and some do not respond at all. Reminders are also ignored.

B. Recommendations

250. With regard to the United Kingdom and Northern Ireland, the Special Rapporteur recommends that an independent judicial inquiry to investigate the murders of Patrick Finucane and Rosemary Nelson be established. The Special Rapporteur once again urges the Government to make public the second report of John Stevens on the Patrick Finucane murder and the Mulvihill report on the investigations into the complaint lodged by Rosemary Nelson with the RUC.

251. In paragraph 4 of resolution of 1994/41 creating the mandate, the Commission urged all Governments to assist the Special Rapporteur in the discharge of his mandate and to transmit to him all the information requested. In the spirit of this paragraph, the Special Rapporteur once again appeals to Governments to respond to his interventions promptly and to respond positively to his requests to undertake in situ missions.

252. The Special Rapportuer calls on Governments, national judiciaries, bar associations and NGOs to submit to him any court judgements and any legislation affecting the independence of the judiciary and the legal profession for his consideration. The Special Rapporteur welcomes this information irrespective of whether such judgements and legislation have the effect of enhancing or restricting the independence of judges and lawyers.

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CIVIL AND POLITICAL RIGHTS, INCLUDING QUESTIONS OF: INDEPENDENCE OF THE JUDICIARY, ADMINISTRATION OF JUSTICE, IMPUNITY

Report of the Special Rapporteur on the independence of judges and lawyers, Dato' Param Cumaraswamy, submitted in accordance with Commission resolution 2000/42

Addendum

Report on the mission to Belarus*

* The executive summary of this mission report is circulated, in all the official languages. The mission report itself, which is contained in the annex to the present document, is reproduced in the language of submission and in Russian only.

GE.01-11054 (E)

Executive summary

The present report concerns a fact-finding mission to Belarus undertaken from 12 to 17 June 2000 by the Special Rapporteur on the independence of judges and lawyers, pursuant to the mandate contained in Commission on Human Rights resolution 1994/41 of 4 March 1994, as renewed for a further three years in resolution 2000/42 of 20 April 2000.

The issues examined by the Special Rapporteur can be summarized as follows:

(a) The state of the administration of justice and in particular the independence and impartiality of the judiciary;

(b) The 1996 referendum and its implications for the independence of the judiciary and the rule of law in Belarus;

(c) The system of legal education and qualification for admission to practise law;

(d) Allegations of threats, harassment and intimidation of judges and lawyers; and

(e) The compliance of Belarusian laws with international norms.

During the mission the Special Rapporteur met with government officials, including representatives of the Ministry of Foreign Affairs, the Ministry of Justice and the Presidential Administration. The Special Rapporteur also met with representatives of the Constitutional Court, the Supreme Court, the Higher Economic Court, the District Court and the procuracy. Various non-governmental organizations, representatives of bar associations, academics and private individuals were also consulted The Special Rapporteur's visit was confined to the city of Minsk.

The Special Rapporteur acknowledges that Belarus is a country in transition and suffers heavily from economic deprivation and the after-effects of the Chernobyl accident. However, the pervasive manner in which executive power has been accumulated and concentrated in the President has turned the system of government from parliamentary democracy to one of authoritarian rule. As a result, the administration of justice, together with all its institutions, namely the judiciary, the prosecutorial service and the legal profession, are undermined and not perceived as separate and independent. The rule of law is therefore thwarted.

The Government appears not to have any regard for its commitments to the international human rights treaties it has ratified, which have supremacy over domestic laws. The Constitution and all laws must be seen to be in accordance with international treaties that the Government voluntarily ratified. Further, article 8 of the Constitution, provides for the "supremacy of the universally recognized principles of international law".

The 1996 referendum on the Constitution

The Special Rapporteur is deeply concerned that the 1996 referendum proceeded contrary to the rule of law and in violation of the independence of the judiciary. The blatant disregard for the decision of the Constitutional Court that the referendum was only of a consultative nature

undermines the rule of law and the balancing role that the judiciary plays as the third arm of government. Decisions of the Constitutional Court are mandatory and the nullification of a decision is, in effect, an interference in the judicial process and contrary to principle 4 of the United Nations Basic Principles on the Independence of the Judiciary.

The parallel legislative powers given to the President by the constitutional amendment to legislate by decree in exceptional situations has lead to unbridled rule by presidential decree. The argument that such power to legislate is essential as the passing of laws through the parliamentary process takes a long time is untenable. It negates the very principle of the separation of powers, which is the core value for the rule of law.

The controversial 1996 Constitution must be reviewed and the excessive executive powers of the President removed. This will restore the balance of governmental power between the three arms of government, in accordance with the doctrine of the separation of powers. In particular, article 84 (11) of the Constitution, vesting in the President the power to dismiss the judges of the Constitutional Court, the Supreme Court and the Economic Court must be repealed. Further, article 101, vesting in the President legislative powers "in instances of necessity", must also be repealed. In this regard Presidential Decree No. 40 of 23 November 1999, Presidential Edict No. 289 of 1998 and similar repressive decrees must be repealed with retrospective effect and any damage done to anyone in the enforcement of these decrees must be compensated. In the case of Parliament delegating to the President the power to legislate under the first paragraph of article 101, such delegation must be circumscribed strictly in accordance with the requirements of the article. The executive must remain accountable to Parliament.

The Special Rapporteur is concerned about the removal from office of Justice Mikhail Pastukhov subsequent to the referendum. The ground specified in the Presidential edict for his removal from office is not provided for by article 18 of the Law on the Constitutional Court of the Republic of Belarus, which governs the early ending of the term of office of a constitutional court judge. Further, the procedure specified in that provision, i.e. that the removal be based upon a recommendation of the Constitutional Court and performed by the national Parliament was not respected. Further, the other asserted basis for removal, section 84 (11) of the Constitution, only permits the President to dismiss judges of the Constitutional Court in accordance with the law. The Special Rapporteur is of the opinion that the President had no power to remove Justice Pastukhov under the above-mentioned laws. The President's action also cannot be justified under article 146 of the Constitution, which requires the formation of the organs of power within three months of the present Constitution entering into force. The President specifically stated that the Constitution was only amended by the referendum, and that the changes did not amount to a new constitution.

The Special Rapporteur considers that Justice Pastukhov was removed without the appropriate procedural guarantees required by Belarusian law and principles 17 and 18 of the United Nations Basic Principles on the Independence of the Judiciary. Further, his removal represented a clear attempt by the President to determine the future composition of the court. Four other judges who did not resign from the court were reappointed to the bench of the court when it was formed again in January 1997.

The judiciary

Executive control over the judiciary and the manner in which repressive actions are taken against independent judges appear to have produced a sense of indifference among many judges for the importance of judicial independence in the system. Many appeared to be content with the flawed appointment, promotional and disciplinary procedures and service conditions. These procedures violate international and regional minimum standards for an independent judiciary.

Judges must be sensitized to the concept of judicial independence, its values and principles, for the full realization of human rights, democracy and sustainable development of the nation. To this extent judges should be given adequate training.

The existence of an independent judiciary requires not only the enactment of legal provisions to that effect but full respect for the independence of the judiciary in practice. The Special Rapporteur is of the view that the creation of an overseeing interdepartmental commission to monitor cases, or direct interference in individual cases by government officials constitutes inappropriate and unwarranted interference in the judicial process. The Government must abolish this commission.

The judicial selection process should ensure that candidates are selected on the basis of objective criteria, and should be seen by the wider public to do so, otherwise the independence of the judiciary will be compromised. The Special Rapporteur considers that the placing of absolute discretion in the President to appoint and remove judges is not consistent with judicial independence. The executive may be involved in the formal appointment process, but not in the selection, promotion or disciplining of judges.

The Special Rapporteur is particularly concerned about the procedure for appointing judges to the Constitutional Court. He considers that placing the power to appoint six of the Constitutional Court judges within the sole discretion of the President constitutes a threat to the independence of the court. There is no requirement in this selection process for the President to engage in consultations with members of the judiciary or the wider legal community in order to ascertain the most appropriate candidates. The procedure lacks transparency and is not based on clearly defined, publicly available criteria. The President also appoints the Chairperson of the Constitutional Court, who plays a role in nominating candidates for the other six judicial positions on the Constitutional Court. This further increases the President's influence over the composition of the court. The absolute nature of the President's role in the appointment of judges to the Constitutional Court means that this court cannot possibly be seen to be independent of the executive.

The Government must establish, by law, an independent judicial council for the selection, promotion and disciplining of judges in order to conform with principle 10 of the Basic Principles on the Independence of the Judiciary, paragraph 1.3 of the General Principles of the European Charter on the Statute of Judges 1998 and paragraph 3 of the Budapest Conclusions on the Guarantees of the Independence of Judges - Evaluation of Judicial Reform. The Special Rapporteur considers that only a judicial selection process by an independent judicial council can meet the twin requirements of impartiality and the appearance of impartiality.

The length of their tenure will play a decisive role in ensuring that judges are free to decide matters before them without any improper influences, inducements, pressures, threats or interference, direct or indirect, as too short a tenure will subject judges to pressures arising from the reappointment process. These pressures are amplified by placing the power of reappointment under the control of the executive, since the executive will frequently appear before the courts as a party or have an interest in the outcome of proceedings decided by the judges. The Special Rapporteur has previously concluded that a five-year tenure is too short to be consistent with judicial independence. Courts in other jurisdictions have expressed similar opinions.

As judges who are appointed on probation do not have the security of tenure that is so essential to ensure their independence, the system of appointing judges on probation and the award of permanent tenure should be under the exclusive control of an independent judicial council.

The substantial number of inexperienced judges compounds the problems associated with a short initial tenure. Many of the persons the Special Rapporteur met during the mission expressed concern that the significant numbers of inexperienced judges, their poor conditions of service and their dependence on the Government threatened the independence of the judiciary and exposed judges to pressure and opportunities for corruption.

The conditions of service of the judiciary are not adequately provided for by law. Their low salaries and their dependence for promotions and other minimal service conditions on the executive and the Presidential Administration compromise judges' ability to decide cases independently. Low salaries also expose the judiciary to opportunities for corruption. The judiciary should be assigned priority in the State budget. Although the Special Rapporteur realizes that Belarus is a country in transition suffering from severe economic problems, he points out that certain minimum standards are necessary for a State to be based on the rule of law. The Government must ensure that remuneration of judges and their conditions of service are adequate to maintain the dignity of their office, so as to enable them to dispense justice impartially.

The legal profession

Similarly, there is excessive executive control of the legal profession, particularly by the Ministry of Justice. Such control undermines the core values of an independent legal profession and the Basic Principles on the Role of Lawyers. Such control leads to abuses, resulting in allegations of harassment, intimidation and interference by the executive.

The Government should enable lawyers to form self-governing associations and refrain from excessive control of the profession. There is no objection to the formation of a single unified profession as provided for by legislation. However, the controlling power must be a body composed in its majority of practising members of the legal profession.

The Special Rapporteur is concerned about the targeting of certain advocates for the defence of their clients. The prosecution or threat of prosecution of advocates for professional activities contravenes principle 20 of the Basic Principles on the Role of Lawyers. The Special Rapporteur considers that the persecution of these advocates for their human rights related work

is a violation of the right to freedom of expression and a violation of principle 14 of the Basic Principles on the Role of Lawyers. Lawyers must be allowed to practise their profession without any harassment, intimidation, hindrance or improper interference from the Government or any other quarter. In this regard, the Government should take note of its obligations under principles 16, 17 and 18 of the Basic Principles on the Role of Lawyers.

The procuracy

The independence and integrity of the procuracy is also undermined by excessive executive control. This leads to serious allegations of prosecutions being commenced or failing to be commenced for apparent political reasons inconsistent with the United Nations Guidelines on the Role of Prosecutors.

The Government must ensure that the prosecutorial system complies with the Basic Guidelines on the Role of Prosecutors. Procurators must be sensitized concerning their duties and responsibilities through suitable training programmes.

Annex

REPORT ON THE MISSION TO BELARUS OF THE SPECIAL RAPPORTEUR ON THE INDEPENDENCE OF JUDGES AND LAWYERS

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Introduction

1. The present report concerns a fact-finding mission to Belarus undertaken from 12 to 17 June 2000 by the Special Rapporteur on the independence of judges and lawyers, pursuant to the mandate contained in Commission on Human Rights resolution 1994/41 of 4 March 1994, as renewed by resolution 1997/23 of 11 April 1997, and further renewed for three years in resolution 2000/42 of 20 April 2000.

2. The Special Rapporteur has received numerous allegations concerning the undermining of the independence of the judiciary and the legal profession in Belarus, particularly since the referendum to introduce a new constitution in November 1996. In his report to the fifty-third session of the Commission on Human Rights, the Special Rapporteur reported on allegations of executive intimidation of the Constitutional Court (E/CN.4/1997/32, para. 77). In his report to the fifty-sixth session of the Commission on Human Rights, the Special Rapporteur expressed his concern regarding the "systematic government interference with the independence and impartiality of judges and lawyers in Belarus". (E/CN.4/2000/61, para. 51)

3. A negotiated Chairperson's statement made at the fifty-first session of the Sub-Commission on the Promotion and Protection of Human Rights indicated the willingness of the Government of Belarus to facilitate a visit by the Special Rapporteur. In the light of the seriousness of the allegations received, the Special Rapporteur sought, in a letter dated 11 October 1999, the consent of the Government of Belarus to undertake a visit to the country. By a letter dated 29 November 2000, the Government indicated its readiness to invite the Special Rapporteur, which was officially confirmed on 5 April 2000.

4. The issues examined by the Special Rapporteur can be summarized as follows:

(a) The state of the administration of justice and in particular the independence and impartiality of the judiciary;

(b) The 1996 referendum and its implications for the independence of the judiciary and the rule of law in Belarus;

(c) The system of legal education and qualification for admission to practise law;

(d) Allegations of threats, harassment and intimidation of judges and lawyers; and

(e) The compliance of Belarusian laws with international norms.

5. The Special Rapporteur, during the course of the mission, met with the following officials inter alia: the Head of the Department of Humanitarian Cooperation and Human Rights of the Ministry of Foreign Affairs, Mr. Ogurtsov; the Deputy Procurator-General, Mr. Alexander Vladimirovich Ivanovski; representatives of the Ministry of Justice, including the First Deputy Minister of Justice, Mr. Victor Grigorevich Galavanov, and the Deputy Minister of Justice, Mr. Alexander Sergeevich; the First Deputy Chairman of the Supreme Court, Mr. Peter Petrovich Miklashevich; judges of the Minsk Frunze Region Court; the Deputy Chairman of the Constitutional Court, Mr. Alexander Vladimirovich Maryskin; the First Deputy

Chair of the Higher Economic Court, Mr. Victor Sergeevich Kamenkov; the Deputy Minister for Foreign Affairs, Mr. Vladimir Nikolaevich Gerasimovich; the Deputy Head of the Presidential Administration, Mr. Alexander Michailovich Abramovich.

6. The Special Rapporteur met with representatives of the Organization for Security and Cooperation in Europe (OSCE), Mr. Hans Georg Wieck.

7. The Special Rapporteur also met with representatives of non-governmental organizations and with private individuals, including: representatives of the Belarus Helsinki Committee, Mr. Gari Pogonyalo, Mr. Mikhail Chigir, Ms. Julia Chigir; the Chairperson of the Belarusian Association of Women Lawyers, Ms. Galina Drebizova; the Chairperson of the Republican Bar Association, Ms. Natalya Iosefovna Andryechik; the Deputy Chairperson of the Republican Bar Association, Ms. Tatiana Matysevich; the Chairman of the Minsk Bar Association, Mr. Valeri Alexevich Mitrofanov; the Dean of the Faculty of Law, Belarusian State University, Mr. Valery Gogunov; the Central and East European Liaison Initiative (CEELI) of the American Bar Association, Ms. Cynthia Alkon; Mr. Obodovsky, Ms. Uelskaya, Ms. Shelmakova, regional labour union lawyers from Minsk, Soligorsk and Mogilev; the Chairman of Ratusha, Mr. Alexander Milinkievich; the Director of the Law Centre for Media Protection, Mr. Mikhail Pastukhov; the Chairman of the Centre for Constitutionalism and Comparative Legal Studies, Mr. Alexander Vashkevich; representatives of Viasna 96; Ms. Antonina Turmovich, a private notary; the Vice Director for Juridical Issues of the Belarusian Union of Entrepreneurs and Employers; Ms. Vera Stremkovskaya, Centre for Human Rights; Mr. Oleg Volchek and Ms. Olga Zudova, Legal Assistance to the Population.

8. The Special Rapporteur also met with the United Nations Resident Coordinator and representatives of the United Nations office in Belarus.

9. The Special Rapporteur visited the city of Minsk during the course of his mission.

10. At the end of the Special Rapporteur's mission, a press conference was held to discuss the preliminary conclusions of the mission and his particular areas of concern.

11. The Special Rapporteur would like to thank the Government of Belarus for its invitation to visit the country and for organizing and providing assistance during the mission.

I. GENERAL BACKGROUND

12. Belarus declared its independence from the Soviet Union on 25 August 1991. A new Constitution was adopted in March 1994 which guaranteed a democratic form of government, based on the rule of law and the separation of powers, with a president directly elected as head of Government and State. In July 1994, Alexander Lukashenko became the first democratically elected president. After several rounds of voting, the deputies to the 13th Supreme Soviet, the national Parliament, were elected in 1995.

13. Since the election of Alexander Lukashenko, there has been a substantial consolidation of power in the Office of the President. In May 1995, a referendum was held that approved the right of the President to dissolve Parliament if it violated the Constitution. In November 1996,

several amendments to the 1994 Constitution were adopted after a procedure which was widely considered to be illegal and unconstitutional (see sect. II). The referendum proceeded contrary to a ruling of the Constitutional Court, of 4 November 1996. Under the new Constitution the old parliament, the Supreme Soviet, was replaced by a bicameral Parliament. A 110-member Chamber of Representatives was formed, consisting of the members of the Supreme Soviet who supported President Lukashenko. A new 64-member Council of the Republic was also formed. Deputies of oblast (regional) level and Minsk City councils elect individuals to this chamber and the President appoints eight members.

14. The amendments introduced by the referendum have resulted in a prolonged political crisis, with many regarding the 13th Supreme Soviet as the legitimate parliament. Members of the international community, including the Council of Europe, the European Union and the OSCE Parliamentary Assembly, criticized the flawed referendum and do not recognize the legitimacy of the 1996 Constitution or the new parliament. Various opposition parties continue to dispute the validity of the amended constitution.

15. The consolidation of power in the office of the President has also corresponded with a marked decrease in respect for human rights. During the past few years, there have been thousands of detentions of representatives of the opposition, mass media and NGO communities in violation of their rights to freedom of expression and peaceful association. Protest marches were organized in 1999 and 2000, again resulting in multiple arrests of protesters, journalists and opposition leaders. Several key opposition personalities also disappeared in 1999-2000. In October 2000, parliamentary elections were held but were not fully representative: many who wanted to participate were refused registration owing to strict and detailed registration requirements. Also, some opposition parties boycotted the election.

16. The Committee of State Security (KGB) and the Ministry of Internal Affairs (MVD), both subordinated to the head of State, remained the leading law enforcement and police organs, as well as the General Procurator's Office. Under President Lukashenko's direction, the Presidential Guard, initially created to protect senior officials, expanded its role and used force against the President's political opponents, with little judicial or legislative supervision. Members of the security forces also allegedly committed numerous human rights abuses.

17. Belarus has ratified the six main United Nations human rights treaties and has acceded to the Optional Protocol to the International Covenant on Civil and Political Rights.

II. THE NOVEMBER 1996 REFERENDUM ON THE CONSTITUTION

18. On 24 November 1996, the Republic of Belarus held a referendum to decide on extensive constitutional changes proposed by the President, Alexander Lukashenko. The President called the referendum after the Supreme Soviet refused to pass the suggested constitutional changes. The Agrarian and Communist factions of the Supreme Soviet also proposed an alternative constitution. The results of the referendum were not officially recognized by many States and international bodies, which declared the results to be illegitimate.

19. The referendum was marked by substantial irregularities in procedure. Although the referendum was officially to take place on 24 November 1996, advance voting started

on 9 November 1996. This advance voting was to allow Belarusian citizens who were going to be absent from Belarus on polling day, or for other exceptional circumstances, to participate in the election. However, reports suggest that up to 25 per cent of the population voted prior to 24 November 1996 and the Government actively encouraged the general population, through the mass media, to take part in the advance voting.

20. The Central Electoral Commission (CEC), the body responsible for elections, was not granted complete control over the conduct of the referendum. The ballots were printed by the Presidential Administration and the CEC was not informed how many were printed. Further, on polling day ballot boxes were not sealed, no identification was required from voters, multiple voting was allegedly common and observers and members of the opposition were denied access to polling stations. Copies of the proposed constitutional amendments were not available at polling stations until several days after voting began. On 14 November 2000, President Lukashenko dismissed the Chairman of the CEC, Victor Gonchar, after he stated that he would not certify the results of the referendum. This action was contrary to the Constitution, which gave exclusive authority to dismiss the Chairman to the Parliament.

21. On 4 November 1996, the Constitutional Court ruled that the proposed amendments to the Constitution could not be introduced through the referendum. The decision stated that the suggested changes amounted to a new constitution and therefore their introduction would be contrary to article 149 of the 1994 Constitution, which only allowed amendments or supplements. The court ruled that therefore the referendum would only be of a consultative nature. On 7 November 1996, President Lukashenko issued a decree annulling the decision of the court and declaring the results of the referendum binding. Prior to the decision of the court, President Lukashenko had reportedly threatened to "take measures" and "defend the people" if the Constitutional Court ruled that the referendum contravened the Constitution.[1]

22. On 19 November 1996, 73 members of the Supreme Soviet sent a request to the Constitutional Court for the impeachment of the President. The Special Rapporteur has learnt that after this procedure was initiated, President Lukashenko started to exert substantial pressure on those Members of Parliament (MPs) who had signed the request. This led to the withdrawal, under duress, of at least 12 signatures from the request for impeachment, taking the number required for an impeachment below the constitutional minimum.

23. On 26 November 1996, 106 deputies of the 13th Supreme Soviet signed a document of allegiance to President Lukashenko, validated the results of the referendum and declared themselves available to join the Chamber of Representatives, the lower house of the new bicameral parliament created by the referendum. The 13th Supreme Soviet, which continued to be recognized as the legitimate parliament by the international community, continued to sit until removed from the parliamentary buildings on 27 November 1996. The deputies who supported President Lukashenko drafted a law abolishing the old parliament and then formed the new Chamber of Representatives. The new Constitution was signed into force on 28 November 1996.

24. After the entering into effect of the new Constitution, six judges of the Constitutional Court submitted their resignation to the President, in protest over his actions. Four others who did not resign were reappointed to the new bench of the Constitutional Court. One judge,

Justice Mikhail Pastukhov, was forced from office by a presidential edict ending his term in office. As a result of his dismissal, Justice Pastukhov lost his entitlement to severance pay or a pension for the remainder of his life. In his meeting with the Deputy Chairman of the Constitutional Court, Mr. Alexander Vladimirovich Maryskin, the Special Rapporteur was told that this action was based upon articles 84 (11) and 146 of the amended Constitution. Article 84 (11) permits the President to dismiss a judge in accordance with the law and article 146 requires the President, Parliament and the Government to form the assigned organs of power within two months of the entering into effect of the Constitution.

III. THE ADMINISTRATION OF JUSTICE ACCORDING TO THE CONSTITUTION AND THE LAW ON THE "JUDICIAL SYSTEM AND THE STATUS OF JUDGES IN THE REPUBLIC OF BELARUS"

25. Subsequent to Belarus independence from the Soviet Union, the Supreme Soviet promulgated the Concept of Judicial and Legal Reform on 23 April 1992, to provide the basis for judicial reform. The Concept of Judicial and Legal Reform had several main goals, including: the creation of a legal system to support a State ruled by law; the establishment of an independent judiciary to guarantee the rights of citizens and ensure the effectiveness of laws; and the implementation of democratic principles that correspond with the norms of international law. The Law on the Judicial System and the Status of Judges in the Republic of Belarus (hereafter, law on the judicial system), which was adopted by the Supreme Council of Belarus on 13 January 1995, expands on that structure.

26. The Constitution of the Republic of Belarus, as amended by the disputed November 1996 referendum, contains several guarantees of rights associated with the administration of justice and establishes a broad structure for the judiciary. Article 2 of the Constitution provides that the attainment of the rights, freedoms and guarantees of the human being are the supreme goal of the State. Article 8 states that the Republic of Belarus recognizes the supremacy of the universally recognized principles of international law and undertakes to ensure that its laws comply with these principles. Section II of the Constitution contains substantial guarantees for the safeguarding of human rights, many of which correlate to those contained in international human rights instruments.

27. Section II contains the following articles that are relevant to the administration of justice:

(a) Article 25 states, inter alia:

"A person who has been taken into custody shall be entitled to a judicial investigation into the legality of his detention or arrest";

(b) Article 36 states, inter alia:

"Judges, employees of the Procurator's office, the staff of organs of internal affairs, the State Supervisory Committee and security organs, as well as servicemen, may not be members of political parties or other public associations that pursue political goals";

(c) Article 60 states, inter alia:

"Everyone is guaranteed protection of his rights and freedoms by a competent, independent and impartial court of law within a time period specified by law";

(d) Article 62:

"Everyone has the right to legal assistance to exercise and defend his rights and liberties, including the right to make use, at any time, of the assistance of lawyers and one's other representatives in court, other State bodies, local government bodies, enterprises, establishments, organizations and public associations, and also in relations with officials and citizens. In the instances specified in law, legal assistance is rendered from public funds.

Opposition to the rendering of legal assistance is prohibited in the Republic of Belarus."

28. Article 61 of section II also provides everyone with the right, in accordance with the international instruments ratified by the Republic of Belarus, to appeal to international organizations to protect their rights and freedoms, provided that all available domestic means of legal defence have been exhausted. Belarus acceded to the Optional Protocol to the International Covenant on Civil and Political Rights, with effect as of 30 December 1992.

29. The judicial system in Belarus consists of the Constitutional Court and the general and economic court systems. The general court system consists of the district courts, the oblast and Minsk city courts, the Supreme Court and the military court system. The economic court system consists of the Higher Economic Court and the oblast and Minsk City economic courts.

30. At the time of the mission, the Special Rapporteur was informed that there were approximately 55 Supreme Court judges, 159 judges in 6 regional courts and the Minsk City Court, 678 regular and 185 administrative judges in 154 district courts. There are 20 judges in the Higher Economic Court, and 96 judges at the oblast level. The Constitutional Court consists of 12 judges.

A. The judiciary

1. Guarantees of independence

31. Article 6 of the Constitution provides for the separation of powers between the legislature, executive and judiciary. These State organs, within the limitations on their powers, are independent and act as a check and balance upon each other.

32. Chapter 6 of the Constitution governs the court system. Article 109 of the Constitution and article 1 of the law on the judicial system vest the exercise of the judicial power in the

courts. These articles also forbid the creation of exceptional courts. Article 110 of the Constitution and article 9 of the law on the judicial system guarantee that judges are independent and only subordinate to the law. Any interference in the administration of justice is prohibited and punishable by law.

33. Article 64 of the law on the judicial system provides:

> "Exerting influence of any form upon a judge with the aim of hindering the full, thorough and objective consideration of a particular case or of securing an unlawful judgement, sentence, ruling or order shall render the culprit liable to criminal proceedings under the legislation of the Republic."

34. The 1994 Law of the Republic of Belarus on the Constitutional Court of the Republic of Belarus contains specific provisions regarding the independence of the Constitutional Court. Article 2 provides, inter alia:

> "The Constitutional Court shall be independent in the exercise of its functions. Any form of pressure on the Constitutional Court or its members in connection with constitutional supervision shall be prohibited and liable to prosecution under law."

35. The law on the Constitutional Court, in article 24, also requires that sufficient funding be provided to the court to ensure the independence of legal proceedings. Further, the court is entitled to independently acquire information, facilities and personnel required for its activities.

36. However, these guarantees of independence are systematically undermined by the Government's and, in particular, the President's attitude to the judiciary. In 1996, the President is reported to have stated that: "Under the Constitution, the judiciary is in essence part of the Presidency. Yes, the courts are declared to be independent, but it is the President who appoints and dismisses judges. Thanks to this, it is easier for the President to pursue his policies through the judiciary."

37. Further, on 5 December 1997, in a speech to the Congress of Judges of the Republic of Belarus, President Lukashenko declared: "We have been watching what rulings judges made when the tax agency went to court. We will make the final analysis, and if there are unsatisfactory rulings not in favour of the State, we will take respective measures according to the legislation."[2]

38. On 30 May 2000, as part of the "public political dialogue", a government organized dialogue between the Government and other political and social forces within Belarus, the President stated that the sentence passed in the case of former Prime Minister, Michael Chigir, had resulted from a compromise between the OSCE and the Belarusian authorities. President Lukashenko stated: "On your instructions, if you want, as a result of your pressure, although I do not welcome it your client was forgiven a lot." Further, that if it was not for this, Mr Chigir would have received a sentence of "at least five years, first in a cell, then somewhere in a prison". Such an agreement was denied by the OSCE.

39. In July-August 2000, the President established by decree an interdepartmental commission to monitor high profile criminal cases and to issue findings with respect to them, prior to a judicial determination of the matter. The commission also investigates cases of alleged disappearance. The members of this body include the President of the Supreme Court, the President of the Higher Economic Court, the Head of the State Prosecutor's Office and the Head of the Ministry of the Interior and of the KGB. It is chaired by the Ministry of the Interior and its deliberations take place in secret. It exists contrary to provisions regarding the investigation of offences and clearly interferes with a judge's determination of the case on the basis of evidence placed before the court. The Special Rapporteur has received information alleging that President Lukashenko, at a meeting of this commission on 30 August 2000, stated that "when the Head of State takes a criminal case under his control, he bears responsibility for it, for the investigation and, it would be wrong to deny it, for the outcome of the judicial proceedings".[3]

40. The Special Rapporteur has also received allegations of more pervasive interference by the executive in the judicial process. During the mission, the Special Rapporteur was informed of allegations of "telephone law". These reports allege that judges are placed under direct pressure to decide certain cases in a particular way when the Government, at the national or local level, has an interest in the outcome of the case. For example, the Special Rapporteur has been informed about the case of Judge Yuri Sushkov of the Leninsky District Court in Bobruysk, who has stated publicly that in two cases he was placed under direct pressure from the executive. Firstly in 1998, in a case involving Bobruysk customs employees, he asserts he was placed under pressure from an investigator from the Mogilev State Prosecutor's Office, KGB employees, the local justice authorities and the president of the regional court, Judge Popenyuk. Secondly, in a case involving administrative proceedings against a Mr. Faletsky, he also alleges he was placed under pressure.

41. The Special Rapporteur is aware of another incident of direct pressure being placed upon judges. In his meeting with Justice Pastukhov, the Special Rapporteur was informed about an incident prior to the 1996 referendum, involving the Constitutional Court. Subsequent to a decision of the court overturning a presidential decree, the President called in all the judges of the Court, except for the Chairman of the Court, Justice Valery Tikhinya. The President waved a file at the judges and stated that he had compromising information on Justice Tikhinya and sought the support of the judges present for his removal. The President talked to the judges present for four hours and alleged that he had compromising information on other judges as well. The judges maintained their support for Justice Tikhinya.

42. The Special Rapporteur is surprised about the lack of concern shown by most judges met during the mission regarding these threats to independence, the non-observance of decisions of the Constitutional Court and the accumulation of power with the President.

2. Appointment

43. The November 1996 referendum substantially altered the procedures governing the appointment of senior judges in Belarus. Prior to the referendum, the Constitution required the

President to supply the Parliament with a list of candidates for election to the positions of Chairmen of the Constitutional Court, Supreme Court and Supreme Economic Court. The appropriate candidate was then elected by Parliament. All other judges on these courts were appointed by Parliament.

44. The amendments imposed by the referendum shifted the main responsibility for the appointment of judges to the President of the Republic of Belarus. The Constitution, in article 84 (8) and (9), now requires the President to appoint the Chairpersons of the Constitutional Court, Supreme Court and Higher Economic Court and all other judges of the Supreme and Economic Courts, with the consent of the Council of the Republic. According to article 84 (10), the President is solely responsible for the appointment of 6 of the 12 Constitutional Court judges and all other judges of the Belarusian courts. Article 98 (3) requires the Council of the Republic to elect six judges of the Constitutional Court.

45. Articles 7 and 56 of the law on the judicial system require the Chairpersons of the Supreme Court and Higher Economic Court to be selected by the Supreme Council of the Republic on the submission of the President of the Republic. Other judges on these courts are selected by the Supreme Council of the Republic. The Vice-Chairs of the Supreme and Economic Courts, the Presidents and Vice-Presidents of district and oblast courts are appointed by the President of the Republic upon the submission of the Minister of Justice and the President of the Supreme Court.

46. The procedure for the selection of judges is as follows. The selection of candidates for a judicial placement is undertaken by the local administration of the Ministry of Justice. A candidate then must pass a qualifying examination held by a judge's qualification board and be recommended for appointment by that board. If the Ministry of Justice accepts that recommendation, the candidate is referred to the Presidential Administration, which then makes the final decision concerning appointment. At this stage, candidates are also subject to confirmation by the Security Council of the Republic of Belarus.

47. Judicial examinations for district and oblast court judges are conducted by oblast level judges' qualification boards. According to article 70 of the law on the judicial system, a qualification board consists of representatives of the judiciary and of the organs of justice. The number of judges on the board is decided by the Conference of Judges, in agreement with the Ministry of Justice. The number of representatives of the organs of justice and the procedure of the qualification board are determined by the President of the Republic. The qualification board of the Supreme Court is selected by the Plenum of the Supreme Court.

48. During the mission, the Special Rapporteur spoke to various representatives of the judiciary and the Government regarding the procedures for the appointment of judges. All considered that the current provisions did not affect judicial independence. Many officials asserted that appointment by the President is consistent with practices in other countries. Whilst appointment by the executive or the legislature is not per se a violation of the independence of the judiciary, the procedure applied must contain appropriate safeguards. During the mission, the Special Rapporteur received many allegations that this process lacked transparency and was heavily influenced by political considerations.

3. Tenure

49. Article 63 of the law on the judicial system provides that judges in all courts are irremovable. They may not be transferred to another position or court without their consent, and their authority may only be curtailed in accordance with the law. Judges serve for an initial period of five years, after which their performance is evaluated by the Presidential Administration and, if it is found to be acceptable, they are reappointed for life. Similar to the initial appointment process, the local divisions of the Ministry of Justice are closely involved in evaluating candidates for reappointment. Article 72 of this law permits the removal of judges upon the expiry of their five-year term in office if an indefinite appointment is refused. Judges on the Constitutional Court are appointed for 11-year terms and may be re-elected for another term. Constitutional Court judges can only serve until 70 years of age.

50. Article 19 of the law on the judicial system provides for the use of judges for administrative issues and enforcement proceedings in district courts. Under article 62, any citizen of the Republic of Belarus aged 23 years, with a university-level legal education and whose behaviour has not discredited him, can be appointed to this position by the President for five-year terms. In Minsk City, these judges hear cases directly in police stations. The Special Rapporteur has been informed that there are 174 judges in such positions.

51. During the mission the Special Rapporteur was informed that judges with less than three years experience amounted to nearly 40 per cent of the entire bench, with approximately 15 per cent having been on the bench for less than one year. Less than 23 per cent of judges have been working as judges for over 10 years. This level of inexperience is symptomatic of the high turnover of judges.

52. Officials consulted during the mission asserted that the existence of the five-year initial appointment period did not constitute a threat to independence. Rather, it was a means of ensuring that only quality judges were appointed for indefinite terms.

4. Conditions of service

53. Article 76 of the law on the judicial system requires judges to be paid an amount that shall be sufficient to guarantee the independent performance of their judicial functions and which takes into consideration their qualification, grades and length of service. The official salaries of the Chair and Vice-Chair of the Supreme Court and Higher Economic Court should be set at the levels of the official salaries of the President and Vice-President of the Supreme Council of the Republic respectively. All other judges' salaries are set as percentages of the official salaries of the Chairs of the Supreme and Higher Economic Court.

54. Contrary to the requirements of this article, Presidential Edict No. 271 of 13 July 1995 set judges salaries as multiples of the rates payable to first-level judges. This edict was found to be inconsistent with the Constitution and Belarusian law by the Constitutional Court on 28 February 1995. Subsequent to this decision, Presidential Edict No. 625 of 4 December 1997 was passed, which stated that the salaries of the Presidents of the Constitutional, Supreme and Higher Economic Courts are set by the President personally. Other judges' official salaries are set as a percentage of those figures.

55. In addition to their official salary, judges can be paid up to 50 per cent of their salary every month as a bonus. The decision to award a bonus is based on agreement between the head of the Ministry of Justice at the oblast level and the president of the court concerned. The Presidential Administration decides on the bonuses for the higher courts.

56. Concern was expressed on many occasions by non-governmental organizations over the low level of pay for some judges. They stated that this exposed judges, particularly at the lower level to opportunities for corruption. The average level of pay for a judge on the District Court is estimated to be between US$ 30 and 45 per month. Judges on the Constitutional Court received US$ 150 per month.

57. The promotion of judges to higher levels is governed by Presidential Edict No. 35 of 1997. The relevant qualification board holds exams and recommends whether a person should be promoted to a higher grade. The President is responsible for the award of a higher grade. An increase in grade entitles a judge to a salary supplement. In accordance with article 63 of the law on the judicial system, judges cannot be transferred to another position or court without their personal consent.

58. An important element of a judge's conditions of service is the provision of adequate housing. The allocation of housing to judges who lack accommodation or are in need of better housing is provided for by article 76 of the law on the judicial system. Under this article, a judge, not more than six months after appointment or placement on the list of individuals requiring accommodation, is entitled to be provided with housing. The Special Rapporteur was informed during the mission that, with the current shortage of adequate housing, this obligation is frequently not respected and that many judges have to be conscious of the need for maintaining good relations with the local government or presidential administration to ensure the provision of housing. Further, in accordance with Presidential Edict No. 25 of 1997, judges' or prosecutors' houses (unlike those of other officials) are defined as official dwellings. Therefore, if judges are dismissed they immediately lose their right to government housing and are not provided with another dwelling. This presidential edict was made retroactive, contrary to article 104 of the Constitution.

5. Discipline and removal

59. Article 111 of the Constitution provides that the grounds for selecting or appointing judges and their dismissal are to be determined by law. Article 84 (11) empowers the President to dismiss the Chairperson and judges of the Constitutional Court, Supreme Court and Economic Court in the order determined by the law and with notification to the Council of the Republic.

60. Article 63 of the law on the judicial system states that a judge's authority may be curtailed only on the grounds specified and in accordance with the procedure laid down by the act. Article 72 provides that judges may be stripped of their authority for knowingly breaking the law or for demeaning conduct incompatible with their position, or when a court judgement convicting them of an offence becomes enforceable. This can only be done through a decision of the body that appointed them.

61. Judges may be relieved of their functions on the following grounds: if their state of health prevents them from continuing to work; upon selection for or appointment to another position, or transfer with their agreement to other work; upon the expiry of their five-year term of office as a judge if an indefinite appointment is refused; if a judges' qualification board concludes that further service as a judge is not possible; at their own request; or if they lose Belarusian citizenship. This decision shall be taken by the body that selected or appointed them, due regard being given to the findings of a judges' qualification board in the specified instances.

62. Article 73 provides that the grounds and the procedure for disciplinary proceedings against judges shall be defined in the regulations on the liability to disciplinary proceedings of judges. These are set out in Presidential Edict No. 626 of 1997. The grounds for discipline are: breaking the law in the consideration of cases; an occupational misdemeanour; and failure to observe the work rules, in which case the judge is called to account by the head of the court. Disciplinary proceedings can be brought by: the President of the Supreme Court against all general court judges; the Minister of Justice against all general and economic court judges other than judges of the Supreme Court and Higher Economic Court; the presidents of all courts equivalent to the oblast level against judges of the lower courts; and the head of the appropriate organ of justice against judges at the district level. The President can institute proceedings against the Chairpersons of the Supreme Court and Higher Economic Court. Disciplinary proceedings are conducted by a qualification board of judges in the presence of the judge concerned.

B. The procuracy

63. The Procurator's Office is governed by chapter 7 of the Constitution and the Procurator's Office Act. It is responsible for supervising the strict and uniform implementation of all laws and the execution of all court verdicts. The work of the office is directed towards ensuring the supremacy of the law and reinforcing law and order, so as to uphold the rights and freedoms of citizens and the legitimate interests of the State.

64. The office is an independent body that reports to the Supreme Council of the Republic, which monitors the office's work through a special monitoring commission. However, under article 127 of the Constitution, the Procurator-General is made directly accountable to the President. The Procurator-General is appointed by the Chamber of Representatives upon the recommendation of the President.

65. The Special Rapporteur has received many allegations of prosecutions being commenced or failing to be commenced for apparent political reasons. In March 2000, hundreds of demonstrators and journalists were assaulted and arbitrarily detained after assembling for a peaceful demonstration. Some of the demonstrated arrested, were found to have committed administrative offences and were fined up to between 20 and 30 times the average salary or sentenced to short periods of detention. These cases were heard by administrative judges, directly in the police station, on the basis of evidence provided by police witnesses. In these cases, the accused are only provided with legal representation if they request it. The procuracy failed to commence criminal proceedings against those responsible for the illegal actions. The

Special Rapporteur is also concerned about the prosecution of many leading members of the opposition in situations that connote a political motivation. Under Belarusian election law, those convicted of offences, whether of a substantial or a minor nature, are not permitted to run for public office.

IV. THE LEGAL PROFESSION

A. Lawyers

66. Article 62 of the Constitution guarantees the right to legal assistance. The chief function of the legal profession, in accordance with article 62 and article 2 of the Legal Profession Act, No. 2406 of 1993, is to provide qualified legal assistance to individuals and legal entities in the defence of their rights, freedoms and legitimate interests. Article 4 of the Legal Profession Act provides that everyone has the right to apply to a lawyer of his or her own choosing. There are approximately 1,500 lawyers practising in Belarus.

67. The conditions governing the exercise of legal activities were substantially changed by Presidential Decree No. 12 of 3 May 1997 on "Measures to improve the operation of the legal and notarial professions in the Republic of Belarus". Prior to the entry into force of this decree, advocates were able to become members of the collegium of advocates or could form private organizations of advocates. Article 1.4 of the decree and article 13 of the Act on the Legal Profession now provide that the legal profession may only be exercised by persons belonging to an oblast-level or Minsk municipal bar association. Advocates have access to clients in pre-trial detention and can represent them in criminal court proceedings.

68. Other legally trained persons can practise in law firms that are specially licensed by the Ministry of Justice, but are not able to appear in criminal court proceedings. These legal firms' activities are restricted primarily to contractual work.

69. Prior to becoming a member of a bar association, an individual must have attained a university-level legal education and have at least three years' working experience, or have followed an on-the-job training programme of between six months and one year. Subsequent to this, a candidate must complete an examination held by the Lawyers' Qualification Commission. Upon the recommendation of this commission, a candidate's application is then forwarded to the Ministry of Justice for a final determination on the granting of a licence. The decision of the qualification commission is not binding. If the Ministry of Justice approves of the candidate, a five-year licence is issued.

70. Upon the expiry of the five-year term, an application must be submitted to the Ministry of Justice for renewal. An application must be accompanied by an attestation from the applicants bar association stating that the applicant has been complying with the legislation governing the legal profession. To obtain a licence, a fee equivalent to 10 times the standard minimum wage must be paid. This five-year licence term, by article 1.2 of the 1997 decree, was deemed to apply to all licences issued prior to entry into force of the decree.

71. The activities of the Lawyers Qualification Commission are governed by the 1997 Regulations of the Lawyers Qualification Commission. The Minister of Justice appoints members of the Lawyers Qualification Commission for three-year terms. The Commission is chaired by the Deputy Minister of Justice and consists of no fewer than nine persons, including representatives of the courts, experts in law, representatives of State bodies, including the security services, and not less than four representatives of the legal profession. Prior to Decree No. 12, the Commission consisted only of lawyers and had only one representative of the Ministry of Justice. The Commission uses the stamp and the seal of the Ministry of Justice.

72. Under article 19 of the Act on the Legal Profession, lawyers are subject to disciplinary measures for contravening the act and the standards of professional ethics. Disciplinary proceedings shall be commenced by a motion of the Ministry of Justice based upon a complaint from any interested party. The proceedings are conducted by the professional bodies of the legal profession. A licence to practise as an advocate may also be suspended if an advocate takes up judicial or other State activities or moves to another organization, enterprise on institution, or enters full-time education. The Minister of Justice has a separate power to suspend a licence for one month for a breach of legislation or professional ethics, or for another misdemeanour.

73. The Ministry of Justice has other substantial powers over the legal profession. It can, inter alia: issue regulations, in accordance with legislation, to govern the activities of advocates; suspend decisions of the governing body of advocates that are not in keeping with the legislation and submit a motion to annul a decision of that body; exercise other powers in connection with the overall and methodological governance of the legal profession; and monitor compliance with legislation by all advocates.

74. The Ministry of Justice informed the Special Rapporteur that Decree No. 12 of 1997 was necessary to ensure that all advocates are members of one organization, so there can be uniform control over assistance to the poor. A five-year term was required to ensure that advocates continued to improve the quality of their legal service. For example, if advocates do not appear in court, they should be disbarred. It is also necessary that the Ministry of Justice control disciplinary proceedings, as advocates will be reluctant to discipline each other.

75. All advocates met with during the mission expressed significant opposition to Decree No. 12 of 1997 and considered that it interfered with the independence of the bar. Concerns were also expressed over the presence of non-lawyers on the lawyers' qualification commissions and the control that the Ministry of Justice exercises over the conduct of the qualifying exams, licensing and renewal.

76. Representatives of the Minsk Bar Association and the National Bar Association drew attention to the fact that the five-year licence period had not been introduced upon the recommendation of any of the bar associations of Belarus. They also expressed concern over the requirement for an attestation from an advocate's bar association for renewal of a licence to practise. It was not considered necessary to gather information on every advocate every five years. If the purpose of the attestation was to ensure that advocates had not contravened the laws on the legal profession, this would be more appropriately achieved on an individual basis, through disciplinary proceedings.

77. Some advocates allege that they are continually subject to harassment and interference with their legal activities. Several advocates whom the Special Rapporteur met during the mission alleged that they had been given warnings by their bar association because they had asserted that their client was not guilty, or had challenged the legality of the court proceedings.

78. Ms. Galina Drebizova, Chair of the Belarusian Association of Women Lawyers and an outspoken advocate of an independent bar, was paid a fee for services rendered to one of her clients. The Procurator brought a case against her, alleging that the fee was not warranted and was a secret way of funding the opposition. She had paid taxes on the amount. Her case went to trial in June 1998 and the appeal process was completed in 1999, when the court found in her favour. During the trial, her innocence was affirmed by her client and by a large number of other lawyers.

79. During the mission, the Special Rapporteur met Ms. Vera Stremkovskaya, President of the Centre for Human Rights in Belarus and a leading attorney, who has been targeted for her role in defending clients in politically sensitive cases. In 1999, Ms. Stremkovskaya was the subject of two criminal proceedings connected with the defence of her client, Mr. Staravoitov, a former official in President Lukashenko's Government. Whilst acting in defence of her client, Ms. Stremkovskaya questioned a prison doctor's experience and qualifications in order to secure her client's release from pre-trial detention on medical grounds. As a result, a criminal libel complaint was lodged against her. The lead prosecutor in the case also lodged a criminal libel complaint, after Ms. Stremkovskaya questioned whether the prosecution had mishandled evidence. The criminal libel trial is still ongoing. She had been warned on previous occasions to choose between her support for human rights and the practice of law. In May 2000, the premises of the Centre for Human Rights were broken into and computers, photocopiers and documents were stolen. An investigation is still continuing. Around the same time, the offices of another well-known human rights lawyer, Oleg Volchek, were also broken into.

80. The Special Rapporteur also met Gary Pogonyailo, Vice Chair of the Belarusian Helsinki Committee. Mr. Pogonyailo was disbarred in 1998 for allegedly disclosing details about a criminal investigation in one of the cases in which he was acting as defence counsel. The details of the investigation into his client were asserted by the Government to be secret. Mr. Pogonyailo was disbarred immediately following his defence of journalists Pavel Shemeret, Yaroslav Ovchinnikov, Dmitry Zavadsky in a high-profile court case. Mr. Pogonyailo is still unable to practise as an advocate in Belarus, despite holding a licence to practise law in Russia, which entitles him to represent clients in criminal proceedings in Belarus.

81. The Special Rapporteur has received other information regarding the harassment of lawyers. Olga Zudova represented the former Minister of Agriculture, Vasily Leonov, during his trial for bribery and large-scale embezzlement. During that case, the Procurator repeatedly requested the commencement of an investigation by the Ministry of Justice against Ms. Zudova, after she challenged certain procedural irregularities. She was warned by the Belarus College of Advocates not to cause trouble. Ms. Zudova stated during her meeting with the Special Rapporteur, that she had met with the Deputy Minister of Justice, who had asserted that he would try to protect her, but that if the Presidential Administration complained there was nothing that he could do.

82. Nadezhda Dudareva was disbarred in 1998 for an alleged breach of the lawyers' professional code of conduct and for failing to appear before the Qualification Commission. Ms. Dudareva had announced her intention to publicize several violations of human rights that had occurred in the trial of one of her clients. The judge in the case considered that this constituted an insult to the court and ordered the instigation of criminal proceedings. Although the proceedings against Ms. Dudareva were discontinued, the procurator's office sent a letter to the bar association claiming that she had violated the code of conduct. She was disbarred for failing to appear before the Qualification Commission owing to other court commitments.

83. Myacheslav Grib was disbarred in July 1997 after being required to take a requalifying examination as a result of Presidential Decree No. 12 of May 1997. Mr. Grib had been convicted for organizing a march on the third anniversary of the Constitution, contrary to Presidential Decree No. 5 of 1997.

B. Notaries

84. Until 1993, all notaries in Belarus worked for the State Notarial Office. In 1993, the Supreme Soviet, based on the Concept for Judicial and Legal Reform, introduced private notarial practice for one year as an experiment in Minsk. Private notaries performed the same notarial functions as State notaries and collected a fee equivalent to that of State notaries, with which they were to cover their expenses and the relevant taxes. The experiment was considered to be successful and, in 1994, the private notarial practice was extended to operate over the whole country until the enactment of a new law governing the notarial service.

85. In 1997, the above-mentioned Presidential Decree No. 12 also changed the regulations regarding notarial practice. Instead of collecting a fee, private notaries now collected the State duty plus a notarial tariff to pay their other expenses. The decree also suspended the issuance of new private notarial licences. At the same time, the President issued Instruction No. 135 to the Security Council of Belarus and the Committee of State Control to find ways of recouping the money that private notaries had earned during the experiment. Despite concerns over the legality of such a measure, State procurators brought actions to recover some of the notarial fees in 1997.

86. On 23 January 1998, the Constitutional Court declared that the decisions of the Government in 1993 and 1994 with respect to private notary practice were void and instructed the competent authorities to address the issue of reapportionment of State duty. In doing this, government officials were to take into account the responsibility of the State for failing to enact the appropriate legal regime.

87. In response to this decision, the President issued Edict No. 289 of 1998 requiring private notaries to pay back all fees collected between 1993 and 1997, with no allowance being made for expenses or taxes paid during that period. The edict required all fees to be paid back by 1 July 1998. An interdepartmental commission, consisting of representatives of the Ministry of Justice, the Ministry of Finance, the Security Council of Belarus and the Committee of State Control, was established to determine the amount that was required to be paid back by private

notaries. The individuals concerned were required to sign a voluntary undertaking to return the money that they had earned during that period, or otherwise face judicial proceedings. The decisions of this commission concerning the amount of money owed were declared to be final and binding on all State bodies.

88. The Special Rapporteur has learnt that threats were made to notaries and their families in order to force them to sign the voluntary undertaking to repay. The Special Rapporteur is also concerned about numerous procedural irregularities that occurred during the hearing of these cases. Some of the cases that challenged decisions of the interdepartmental commission were heard by "acting interim judges". Such a judicial position is not provided for by Belarusian law and cannot be seen to be independent. The Special Rapporteur has been informed that in one case involving a private notary the acting judge was named as a full judge 11 days after the decision in the notary's case. Further, the courts in these cases were precluded by the final and binding nature of the decision of the interdepartmental commission from determining the accuracy of the amount owed. This is clearly an interference in judicial procedure.

V. THE STATE OF THE LAW

89. The 1996 amendments to the Constitution substantially increased the powers of the President of the Republic. Article 85 of the amended Constitution allows the President to issue decrees and orders, on the basis of and in accordance with the Constitution, which are binding within Belarus. Article 85 identifies three kinds of presidential acts: decrees, orders and instructions. Further, article 97 permits the President to submit a draft law for the amendment or alteration of the Constitution and article 99 grants him the right of legislative initiative.

90. Article 101 permits the Chamber of Representatives and the Council of the Republic, on the proposal of the President, to adopt a law, supported by the majority of the full composition of both chambers, which delegates to the President powers to issue decrees that have the force of law. The scope and terms of the powers will be determined by that law. Decrees issued under a delegated power cannot be retroactive. Article 101 further provides that the President, in instances of necessity, may issue temporary decrees that have the force of law. These decrees are then submitted for approval to the Parliament within three days of their adoption and remain valid unless they are rejected by a majority of no less than two thirds of votes of the full composition of both chambers of Parliament. Article 137, paragraph 3 states, "in the case of a discrepancy between a decree or ordinance and a law, the law applies if the powers for the promulgation of the decree or ordinance were provided for by the law". Therefore, in the event of an inconsistency, decrees issued under a delegated power are subordinate to the law. However, decrees issued under the "necessity" power, not being issued under a law, prevail over existing laws.

91. The First Deputy Minister of Justice, Mr. Galavanov, expressed the view during the mission that the presidential power to issue decrees was essential, as the passing of laws through Parliament often took a long time. He said that the decree-making power could be used when quick work was required and that the content of the law was more important than its form. The Deputy Minister was not concerned whether it was the President or the legislature that passed laws.

92. The Special Rapporteur was also informed during the mission that prior to the 1996 referendum the Constitutional Court had found 17 decrees of the President to be unconstitutional. The new Constitutional Court has yet to find unconstitutional any of the estimated 43 decrees and 787 edicts which have been issued since 1996. Further, the Special Rapporteur was informed by the Constitutional Court that all of the decrees issued by the President have been based on the "necessity" power; however, as yet, no definition of that term has been promulgated, by the Constitutional Court or in legislation.

93. Article 8 of the Constitution acknowledges the supremacy of the universally recognized principles of international law and obliges the Republic of Belarus to ensure that its laws comply with these principles. The Special Rapporteur is greatly concerned about the non-compliance of many Belarusian laws with international norms and the seeming impunity by which these norms are violated.

94. The Special Rapporteur noted one particularly worrying example of the use of the President's power to issue temporary decrees. Presidential Decree No. 40 of 23 November 1999 on "Measures regarding harm carried out against the State" allows for the confiscation of property in cases of suspicion by the President of harm committed against the State by an individual or legal entity. In such cases the property is taken by the Ministry for State Property and Privatization "if something different is not established by the President". The confiscation of the property may be appealed to a court, which may return the property or its monetary equivalent. Confiscation of property without a court decision is in violation of article 44 of the Constitution and international human rights norms.

VI. APPLICABLE INTERNATIONAL AND REGIONAL STANDARDS

95. The following international and regional standards are relevant:

(a) Basic Principles on the Independence of the Judiciary;

(b) Basic Principles on the Role of Lawyers;

(c) Paragraph 27 of Part I of the Vienna Declaration and Programme of Action of 1993;

(d) Guidelines on the Role of Prosecutors;

(e) Council of Europe minimum standards in paragraph 1.3 of the European Charter on the Statute for Judges of 1998;

(f) Budapest Conclusions on the Guarantees of the Independence of Judges - Evaluation of Judicial System of 1998, in particular paragraph 3.

96. Principle 10 of the Basic Principles on the Independence of the Judiciary states:

> "Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall

safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement that a candidate for judicial office must be a national of the country concerned shall not be considered discriminatory."

97. General Principle 1.3 of the Council of Europe European Charter on the Statute for Judges states:

"In respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the statute envisages the intervention of an authority independent of the executive and legislative powers within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary."

98. Paragraph 3 of the Budapest Conclusions on the Guarantee of the Independence of Judges - Evaluation of Judicial Reform, of 1998, provides:

"The independence of judges must provide in return a system of disciplinary responsibility, guaranteeing the citizen an efficient and competent judicial power. This responsibility should be exercised according to procedures which ensure sufficient guarantees for the protection of individual rights and freedoms of the judge, following the rules laid down in Article 6 of the European Convention of Human Rights, by an independent authority, consisting of renowned judges. Dismissal or compulsory retirement, except for health reasons, should only be carried out on the basis of disciplinary procedures, which allow the possibility to appeal."

99. Paragraph 27 of Part I the Vienna Declaration and Programme of Action of 1993 provides:

"Every State should provide an effective framework of remedies to redress human rights grievances or violations. The administration of justice, including law enforcement and prosecutorial agencies and, especially, an independent judiciary and legal profession in full conformity with applicable standards contained in international human rights instruments, are essential to the full and non-discriminatory realization of human rights and indispensable to the processes of democracy and sustainable development. In this context, institutions concerned with the administration of justice should be properly funded, and an increased level of both technical and financial assistance should be provided by the international community. It is incumbent upon the United Nations to make use of special programmes of advisory services on a priority basis for the achievement of a strong and independent administration of justice."

VII. CONCLUSIONS AND RECOMMENDATIONS

A. Conclusions

100. The Special Rapporteur acknowledges that Belarus is a country in transition and suffers heavily from economic deprivation and the after-effects of the Chernobyl accident. However, the pervasive manner in which executive power has been accumulated and concentrated in the President has turned the system of government from parliamentary democracy to one of authoritarian rule. As a result, the administration of justice, together with all its institutions, namely, the judiciary, the prosecutorial service and the legal profession, are undermined and not perceived as separate and independent. The rule of law is therefore thwarted.

101. Parallel legislative powers given to the President to legislate by decree in exceptional situations has lead to unbridled rule by presidential decree. The argument that such power to legislate is essential as the passing of laws through the parliamentary process takes a long time is untenable. It negates the very principle of the separation of powers, which is the core value for the rule of law.

102. The Government appears not to have any regard for its commitments to the international human rights treaties it has ratified, which have supremacy over domestic laws.

103. The Special Rapporteur is deeply concerned that the 1996 referendum proceeded contrary to the rule of law and in violation of the independence of the judiciary. According to article 129 of the 1994 Constitution, decisions of the Constitutional Court are final and not subject to appeal. Principle 4 of the Basic Principles on the Independence of the Judiciary states: "There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law."

104. The Constitutional Court is the body entrusted with interpreting the Constitution; the other organs of government are obliged to follow its decision. The blatant disregard for the decision of the court undermines the rule of law and the balancing role that the judiciary plays as the third power of government. Decisions of the Constitutional Court are mandatory and the nullification of a decision is, in effect, an interference in the judicial process.

105. Principles 17 and 18 of the Basic Principles on the Independence of the Judiciary state, respectively: "A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing. The examination of the matter at its initial stage shall be kept confidential, unless otherwise requested by the judge" and "Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties".

106. The presidential edict removing Justice Pastukhov from office stated the grounds for removal as termination of his office. The Special Rapporteur is concerned that this ground was not provided for by article 18 of the Law on the constitutional court of the Republic of Belarus,

which governs the early termination of the office of a Constitutional Court judge. Further, the procedure specified in that provision, i.e. that the removal be based upon a recommendation of the Constitutional Court and performed by the national Parliament, was not respected. Section 84 (11) of the Constitution only permits the President to dismiss judges of the Constitutional Court in accordance with the law. The President had no power to remove Justice Pastukhov under this law.

107. The other constitutional basis asserted for the removal of Justice Pastukhov does not seem to be supported by the alleged facts of the situation. The President's action cannot be justified under article 146, which sets out transitional provisions for the entry into force of the Constitution. The President specifically stated that the Constitution had only been amended by the referendum and that the changes did not amount to a new constitution. Further, the amendments did not terminate the existence of the Court, so there was no need to form a completely new court. The Special Rapporteur is concerned that not only was Justice Pastukhov removed without the appropriate procedural guarantees required by international standards and Belarusian law, but that his removal represented a clear attempt by the President to determine the future composition of the Court. Four other judges who did not resign from the Court were reappointed to the bench of the Court when it was reformed in January 1997.

108. Executive control over the judiciary and the manner in which repressive actions are taken against independent judges appear to have produced a sense of indifference among many judges regarding the importance of judicial independence in the system. Many appeared to be content with the flawed appointment, promotional and disciplinary procedures and service conditions. These procedures violate international and regional minimum standards for an independent judiciary.

109. The existence of an independent judiciary requires not only the enactment of legal provisions to that effect but full implementation of that principle in practice. Article 1 of the Basic Principles on the Independence of the Judiciary states: "The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary." The Special Rapporteur is of the view that the creation of an overseeing interdepartmental commission or direct interference in individual cases by government officials constitutes inappropriate and unwarranted interference in the judicial process. The Special Rapporteur also believes that the constant monitoring of the activities of the judiciary is intended to intimidate members of the judiciary into deciding all cases in line with the Government's wishes, rather than in accordance with the law and the evidence.

110. A judicial selection process should ensure that candidates are selected on the basis of objective criteria and should be seen by the wider public to do so, otherwise the independence of the judiciary will be compromised. In the light of these requirements, the Special Rapporteur has previously recommended that judicial selection processes be conducted by an independent judicial council. The Special Rapporteur considers that the placing of absolute discretion in the President to appoint and remove judges is not consistent with judicial independence. The Special Rapporteur considers that only a judicial selection process conducted by an independent judicial council can meet the twin requirements of impartiality and the appearance of impartiality.

111. The Special Rapporteur is particularly concerned about the procedure for appointing judges to the Constitutional Court. He considers that the placing of the power to appoint six of the Constitutional Court judges within the sole discretion of the President constitutes a threat to the independence of the Court. There is no requirement in this selection process for the President to engage in consultations with members of the judiciary or the wider legal community in order to ascertain the most appropriate candidates. The procedure lacks transparency and is not based on clearly defined, publicly available criteria. The President also appoints the Chairperson of the Constitutional Court, who plays a role in nominating candidates for the other six judicial positions on the Constitutional Court. This further increases the President's influence over the composition of the court. The absolute nature of the President's role in the appointment of judges to the Constitutional Court means that this court cannot possibly be seen to be independent of the executive.

112. Principle 11 of the Basic Principles on the Independence of the Judiciary states: "The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law."

113. Principle 12 of the Basic Principles on the independence of the judiciary requires that judges have guaranteed tenure. Principle 2 requires that judges be free to decide matters before them without any improper influences, inducements, pressures, threats or interferences, direct or indirect. The length of tenure will play a decisive role in ensuring this, as too short a tenure will subject judges to pressures arising from the reappointment process. These pressures are amplified by placing the power of reappointment under the control of the executive, as the executive will frequently appear before the courts as a party or have an interest in the outcome of proceedings decided by the judges. The Special Rapporteur has previously concluded that a five-year tenure is too short to be consistent with judicial independence and courts in other jurisdictions have expressed similar opinions.

114. The substantial number of inexperienced judges compounds the problems associated with a short initial tenure. Many of the persons met during the mission expressed concern that the significant numbers of inexperienced judges, their poor conditions of service and their dependence on the Government threatened the independence of the judiciary and exposed judges to pressure and opportunities for corruption.

115. The conditions of service of the judiciary are not adequately provided for by law. The low level of salaries and the dependence of judges for promotions and other minimal service conditions on the executive and the Presidential Administration compromise judges' ability to decide cases independently. The low level of salaries also exposes the judiciary to opportunities for corruption. The judiciary should be assigned priority in the State budget. Although the Special Rapporteur realises that Belarus is a country in transition and suffers from severe economic problems, certain minimum standards are necessary for a State to be based on the rule of law.

116. Similarly there is excessive executive control of the legal profession, particularly by the Ministry of Justice. Such control undermines the core values of an independent legal profession and the Basic Principles on the Role of Lawyers. Such control leads to abuses that result in allegations of harassment, intimidation and interference by the executive.

117. In this regard, the Special Rapporteur is concerned about the targeting of certain advocates for the defence of their clients. The prosecution or threat of prosecution of advocates for professional activities contravenes the Basic Principles on the Role of Lawyers. Principle 20 provides that "lawyers shall enjoy civil and penal immunity for relevant statements made in good faith in written or oral proceedings or in their professional appearances before a court, tribunal or other legal administrative authority".

118. The Special Rapporteur considers that the persecution of these advocates for their human rights related work is a violation of the right to freedom of expression. Further, it violates principle 14, which states: "Lawyers, in protecting the rights of their clients and in promoting the cause of justice, shall seek to uphold human rights and fundamental freedoms recognized by national and international law and shall at all times act freely and diligently, in accordance with the law and recognized standards and ethics of the legal profession."

119. The independence and integrity of prosecutors is also undermined by excessive executive control. This leads to serious allegations of prosecutions being commenced or failing to be commenced for apparent political reasons inconsistent with the Guidelines on the Role of Prosecutors.

B. Recommendations

120. With regard to the Constitution:

(a) The controversial 1996 Constitution must be reviewed and the excessive executive powers of the President removed. This will restore the balance of governmental power between the three arms of government, in accordance with the doctrine of separation of powers. In particular article 84 (11), vesting in the President the power to dismiss the judges of the Constitutional Court, Supreme Court and Economic Court, must be repealed. Further, article 101, vesting in the President legislative powers "in instances of necessity", must also be repealed. In this regard, Presidential Decree No. 40 of 23 November 1999 and similar repressive decrees must be repealed with retrospective effect and any damage done to anyone in the enforcement of these decrees must be compensated. In the case of Parliament delegating to the President the power to legislate under the first paragraph of article 101, such delegation must be circumscribed to be strictly in accordance with the requirements of the article. The executive must remain accountable to Parliament, not vice versa;

(b) The Constitution and all laws must be seen to be in accordance with international treaties that the Government voluntarily ratified, in accordance with article 8 of the Constitution which provides for the "supremacy of the universally recognized principles of international law".

121. With regard to the judiciary:

(a) The Government must establish by law an independent judicial council for the selection, promotion and disciplining of judges, in order to conform with principle 10 of the Basic Principles on the Independence of the Judiciary, paragraph 1.3 of the General Principles of the European Charter on the Statute for Judges of 1998 and paragraph 3 of the Budapest

Conclusions on the Guarantees of the Independence of Judges - Evaluation of Judicial Reform. The executive may be involved in the formal process of appointment, but may not be otherwise involved in the selection, promotion or disciplining of judges;

(b) As judges who are appointed on probation do not have the requisite security of tenure that is so essential to ensure their independence, such a system of appointing judges on probation and the confirmation of permanent tenure should be under the exclusive control of an independent judicial council;

(c) The Government must ensure that the remuneration of judges and their conditions of service are adequate to maintain the dignity of their office, so as to enable them to dispense justice impartially;

(d) Judges must be sensitized to the concept of judicial independence, its values and principles, for the full realization of human rights, democracy and the sustainable development of the nation. To this effect judges should be given adequate training;

(e) The Government must abolish the interdepartmental commission established to monitor "high profile" criminal cases.

122. With regard to the procuracy:

(a) The Government must ensure that the prosecutorial system complies with the Guidelines on the Role of Prosecutors;

(b) Here again, the prosecutors must be sensitized concerning their duties and responsibilities with suitable training programmes.

123. With regard to the legal profession:

(a) The Government should enable lawyers to form self-governing associations and refrain from excessive control of the profession. There is no objection to the formation of a single unified profession as provided for by legislation. However, the controlling power must be a body composed in its majority of practising members of the legal profession;

(b) Lawyers must be allowed to practise their profession without any harassment, intimidation, hindrance or improper interference from the Government or any other quarter. In this regard, the Government should take note of its obligations under principles 16, 17 and 18 of the Basic Principles on the Role of Lawyers.

(c) Lawyers who were disbarred for upholding the rights of their clients and/or human rights generally should have their cases reviewed and be reinstated to the practise of the legal profession;

(d) Presidential Edict No. 289 of 1998, requiring private notaries to pay back fees earned by them, should be repealed and any monies recovered by the Government should be returned.

Notes

[1] Interfax News Agency, 30 October 1996.

[2] The First Congress of Judges of the Republic of Belarus. Documents and Materials, Minsk, 1998.

[3] "Panorama", 30 August 1999, quoted in O. Gulyak and G. Pogonyailo, "The courts and human rights".